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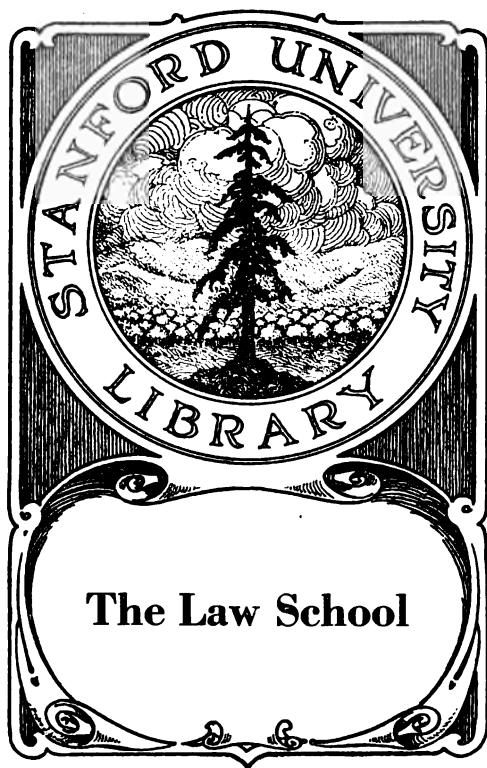
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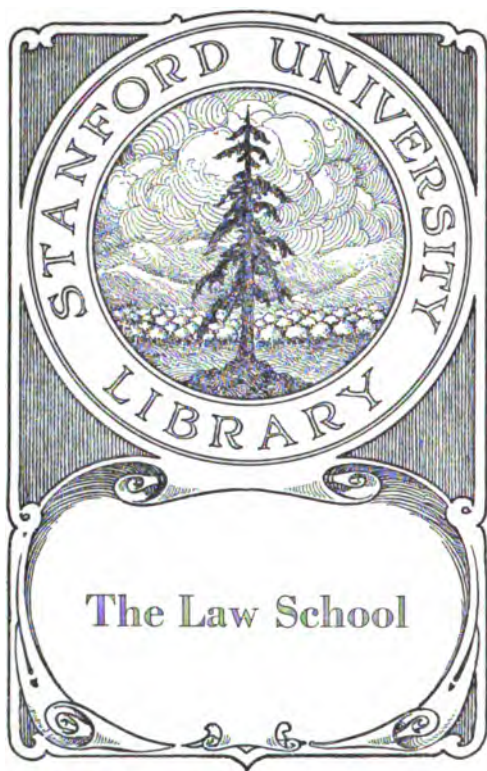
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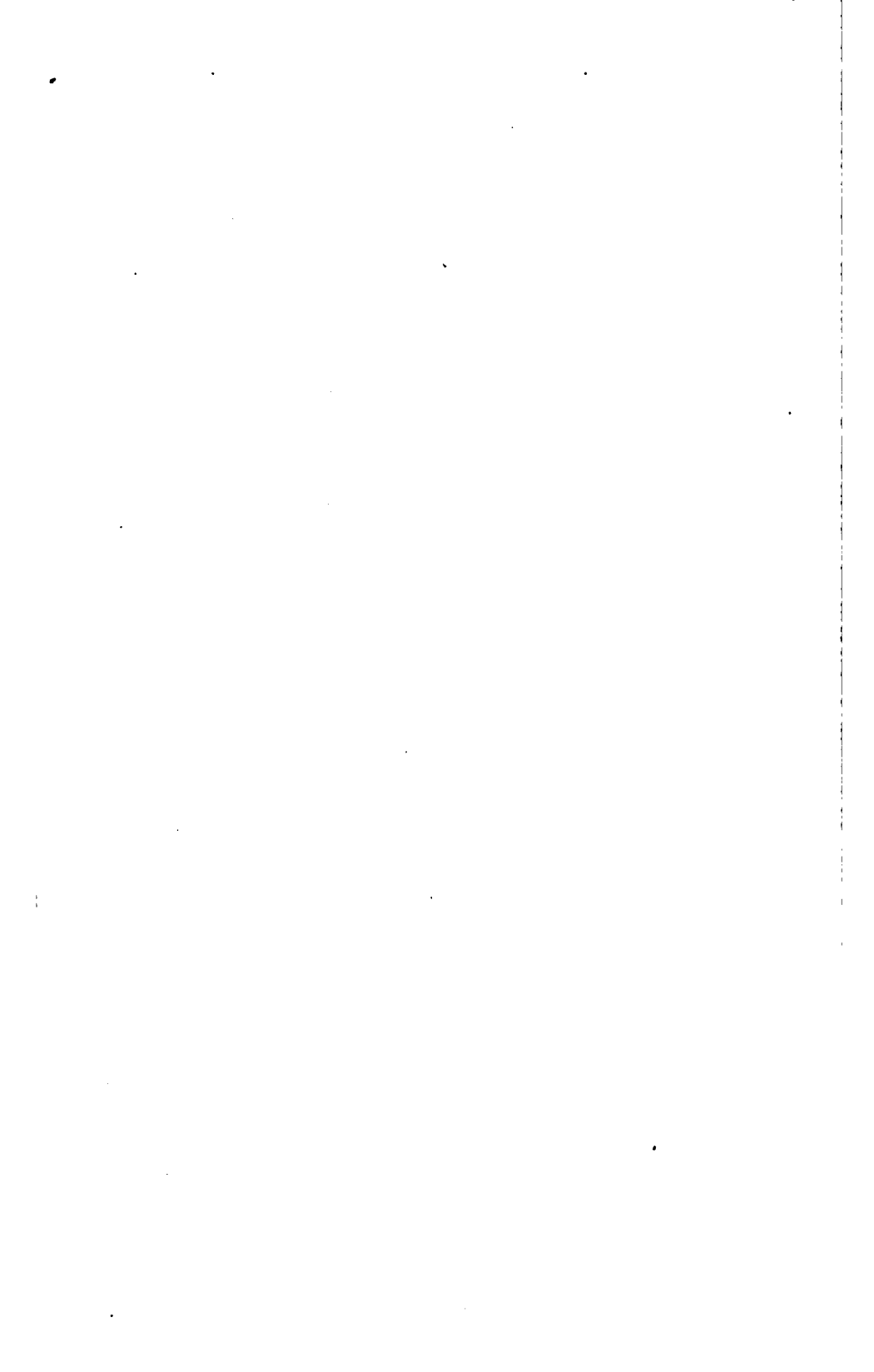
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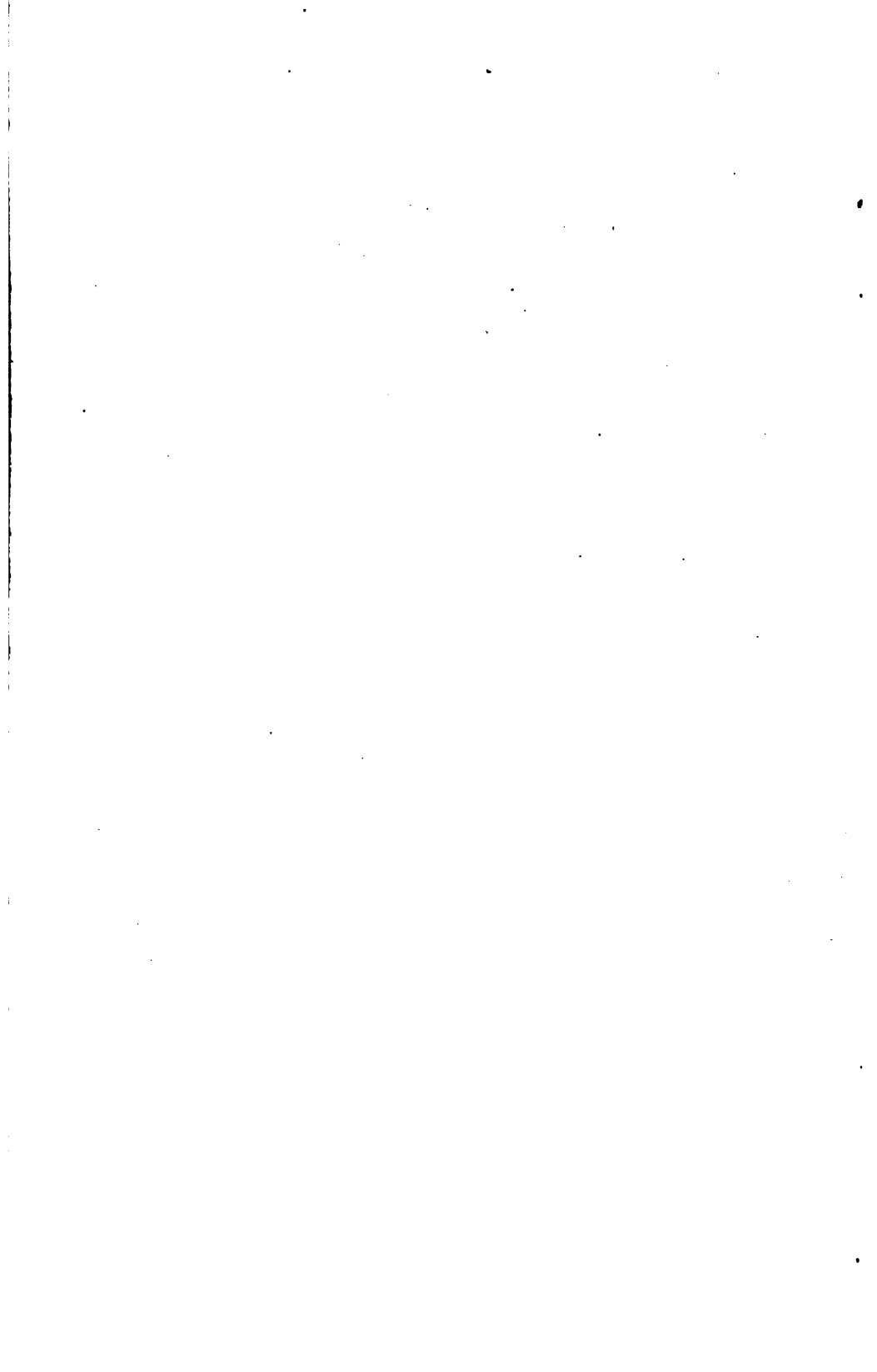


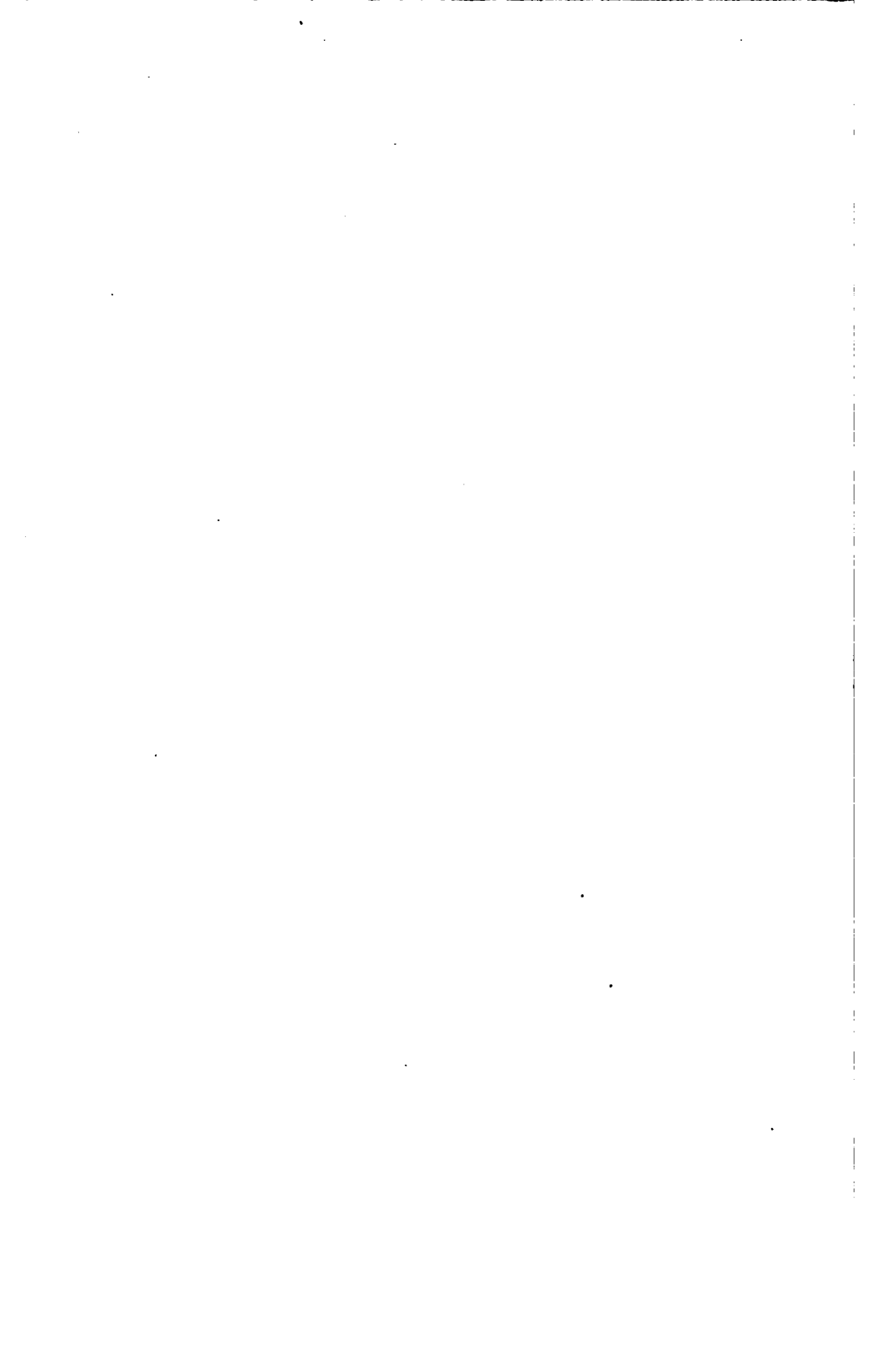












OFFICIAL OPINIONS
OF
THE ATTORNEYS GENERAL
OF
THE UNITED STATES
ADVISING THE
PRESIDENT AND HEADS OF DEPARTMENTS
IN RELATION TO
THEIR OFFICIAL DUTIES

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Of New York.

HON. J. C. McREYNOLDS,
Of Tennessee.

HON. T. W. GREGORY,
Of Texas.

ALSO CONTAINING OPINIONS BY SOLICITOR GENERAL

HON. JOHN W. DAVIS, of West Virginia,

AND

ACTING ATTORNEYS GENERAL

HON. JAMES A. FOWLER,

HON. WILLIAM R. HARR,

HON. WINFRED T. DENISON.

**ALSO CONTAINING CITATIONS OF ACTS OF CONGRESS, THE
REVISED STATUTES, THE CONSTITUTION, TREATIES AND
CONVENTIONS, OPINIONS OF THE ATTORNEYS GENERAL,
AN INDEX TO SUBJECTS, AND AN INDEX-DIGEST.**

Indices and Tables of Citations

prepared by

EMILY A. SPILMAN.

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OPINIONS
OF
HON. GEORGE W. WICKERSHAM, OF
NEW YORK.

APPOINTED MARCH 5, 1909.

DEPUTY COLLECTORS OF INTERNAL REVENUE—TENURE
OF OFFICE.

The term of office of deputy collectors of internal revenue expires automatically upon the appointment of a successor to their own collector, and this limitation of tenure is not affected by section 6 of the act of August 24, 1912 (37 Stat. 555).

In order to continue in office after the appointment of a successor to their own collector, deputy collectors must be affirmatively reappointed and recommissioned.

DEPARTMENT OF JUSTICE,

January 3, 1913.

SIR: I have the honor to reply to your note of November 6, 1912, requesting my opinion on the question stated in a letter dated November 6, 1912, addressed to you by the United States Civil Service Commission.

This question is as follows:

“What is the effect of the provision of section 6 of the act of August 24, 1912 (37 Stat. 539, 555), upon the provision of section 3149, Revised Statutes, as interpreted by the Attorney General, in the matter of the termination or vacation of the office of deputy collector of Internal Revenue?”

Section 6 of the act of August 24, 1912, reads, so far as is now material, as follows:

“That no person in the classified civil service of the United States shall be removed therefrom except for such cause as will promote the efficiency of said service and for

reasons given in writing, and the person whose removal is sought shall have notice of the same and of any charges preferred against him, and be furnished with a copy thereof, and also be allowed a reasonable time for personally answering the same in writing; and affidavits in support thereof; but no examination of witnesses nor any trial or hearing shall be required except in the discretion of the officer making the removal; and copies of charges, notice of hearing, answer, reasons for removal, and of the order of removal shall be made a part of the records of the proper department or office, as shall also the reasons for reduction in rank or compensation; and copies of the same shall be furnished to the person affected upon request, and the Civil Service Commission also shall, upon request, be furnished copies of the same: * * *"

Section 3149, Revised Statutes, as amended, reads, so far as is material, as follows:

"* * * In case of a vacancy occurring in the office of collector, the deputies of such collector shall continue to act until his successor is appointed: * * *"

I am of opinion that the said section 6 of the act of August 24, 1912 (the postal appropriation act), does not prevent the vacation of the offices of the deputy collectors, as implied by the said section 3149. Revised Statutes.

Section 3149, in connection with the original common law (2 Op. 410; 3 Comp. Dec. 648), has always been construed both by administrative officers and legal authorities as defining the length of tenure of the deputy collectors. It makes the term of the deputies coincident by definition with the term of the collector by whom they are appointed, with the qualification that they continue in office until the appointment of a successor collector. And this is so notwithstanding the provisions of the civil service act of 1883 (22 Stat. 403; 3 Comp. Dec. 648, 653; 26 Op. 363; 17 Comp. Dec. 362; *Taylor v. Bercheval*, 82 Fed. 497; *Dudley v. James*, 83 Fed. 345; *Carr v. Gordon*, 82 Fed. 373; *Flemming v. Stahl*, 83 Fed. 940). The two opinions of Judge Jackson (*Priddie v. Thompson*, 82 Fed. 186, and *Butler v. White*, 83 Fed. 578) which are contrary to these cases on some points are not contrary on this main question concerning the duration of the term of office. They deal chiefly with the power of removal.

In view of these authorities and of the uninterrupted administrative practice, it must be considered as settled that, even since the civil service act, the term of office of these deputy collectors expires automatically upon the appointment of a successor to their own collector. In order to continue in office after that time they must be affirmatively reappointed and recommissioned.

This being so, it is apparent that the provision in section 6 of the postal appropriation act of 1912 does not affect the situation, for that act deals only with "removals," which are, of course, quite distinct from automatic terminations by law of terms of office. (*Parsons v. United States*, 167 U. S. 324, 342.) The distinction is clearly brought out by Revised Statutes, section 3148, which deals with the removal of the deputies, in advance of the expiration of their terms referred to by Revised Statutes, section 3149.

I am of opinion, therefore, as above stated, that section 6 of the post-office appropriation act of August 24, 1912, does not repeal the existing limitation upon the tenure of these deputy collectors.

Respectfully,

GEORGE W. WICKERSHAM.

The PRESIDENT.

TRANSPORTATION OF MERCHANDISE FROM SEATTLE TO
FAIRBANKS.

The transportation of merchandise on through bills of lading by American vessels from Seattle to Skagway, thence by rail over the White Pass and Yukon route across the international boundary to Whitehorse, in Yukon Territory, and thence by foreign vessels down the rivers, across the international boundary again, to Fairbanks, would not violate the provisions of section 1 of the act of February 17, 1898 (30 Stat. 248).

DEPARTMENT OF JUSTICE,

January 4, 1913.

SIR: I have the honor to acknowledge the receipt of your letter of November 25, 1912, in reference to the creation of

a subport of entry at Fairbanks, Alaska, on the application of persons who desire to establish a route for transportation of merchandise on through bills of lading from Seattle to Fairbanks by way of Skagway, Alaska, and Whitehorse, Yukon Territory. The method of transportation intended to be employed is by American vessels from Seattle to Skagway, thence by rail, over the White Pass and Yukon route across the international boundary, to Whitehorse, in Yukon Territory, and thence by foreign vessels down the rivers, across the international boundary again, to Fairbanks. In view of the fact that any action you may take on this application would be, as you state, affected to some extent by the question whether such a transportation would or would not violate any of the provisions of section 1 of the act of February 17, 1898 (30 Stat. 248), you submit to me the question whether such transportation is within the provisions of section 1 of said act.

The first and second sections of the act (which are the material portions) are as follows:

"Be it enacted, etc., That no merchandise shall be transported by water under penalty of forfeiture thereof from one port of the United States to another port of the United States, either directly or via a foreign port, or for any part of the voyage, in any other vessel than a vessel of the United States. But this section shall not be construed to prohibit the sailing of any foreign vessel from one to another port of the United States: *Provided,* That no merchandise other than that imported in such vessel from some foreign port which shall not have been unladen shall be carried from one port or place in the United States to another.

"SEC. 2. That section eight of 'An act to abolish certain fees for official services to American vessels, and to amend the laws relating to shipping commissioners, seamen, owners of vessels, and for other purposes,' approved June nineteenth, eighteen hundred and eighty-six, is hereby amended to read:

"SEC. 8. No foreign vessel shall transport passengers between ports or places in the United States, either directly or by way of a foreign port, under a penalty of two hundred dollars for each passenger so transported and landed."

In order to bring the case referred to by you within the terms of this statute, it must be held that it applies not merely to the transportation of merchandise by water from one port of the United States to another port thereof, either directly or via a foreign port, or for any part of the voyage, but also to transportation by land for a part of the trip.

The language of the act forbids any such construction. The words of section 1, by their plain, natural import, refer to a voyage entirely by water by vessels between ports of the United States. To bring the case submitted by you within the act the terms of the statute must be amended so as to read, instead of "by water," "by land or water;" instead of "for any part of the voyage," "for any part of the transportation." Such a vital change in the character of the act, the result of which might be to subject property to forfeiture, can clearly be made only by Congress.

An examination of the legislative history of the act confirms this view. In 1817 Congress enacted a law relating to the transportation of merchandise, which was brought into the Revised Statutes under the title "Vessels in domestic commerce," as section 4347, in the following form:

"No merchandise shall be transported under penalty of forfeiture thereof, from one port of the United States to another port of the United States, in a vessel belonging wholly or in part to a subject of any foreign power."

In order to cover the peculiar conditions existing in trade between this country and Canada on the northern frontiers, an act was passed, July 18, 1866 (now section 3110 of the Revised Statutes), as follows:

"Sec. 3110. If any merchandise shall, at any port in the United States on the northern, northeastern, or northwestern frontiers thereof, be laden upon any vessel belonging wholly or in part to a subject of a foreign country, and shall be taken thence to a foreign port to be reladen and reshipped to any other port in the United States on such frontiers, either by the same or any other vessel, foreign or American, with intent to evade the provisions relating to the transportation of merchandise from one port of the

United States to another port of the United States, in a vessel belonging wholly or in part to a subject of any foreign power, the merchandise shall, on its arrival at such last-named port, be seized and forfeited to the United States, and the vessel shall pay a tonnage-duty of fifty cents per ton on her admeasurement."

By the act of June 19, 1886 (24 Stat. 81), section 8, the principle of the above acts was applied to the passenger traffic, as follows:

SEC. 8. That foreign vessels found transporting passengers between places or ports in the United States, when such passengers have been taken on board in the United States, shall be liable to a fine of two dollars for every passenger landed.

Section 4347, Revised Statutes, in the form quoted above, was construed by the Circuit Court of Appeals for the Ninth Circuit, in the case of the *United States v. 250 Kegs of Nails* (61 Fed. 410), the point being whether the statute covered the case of merchandise shipped from New York to Antwerp in a Belgian vessel and thence transshipped in a British vessel to a port in California, its real ultimate objective. The court, after laying down the principle that, "in interpreting the provisions of such a statute, it is rather the letter of the law, than its spirit, which is to be regarded" (61 Fed. 411), held that this transportation, though an evasion of the statute, was not a violation thereof.

In consequence of the decision of this case in the lower court Congress, by the act of February 15, 1893 (27 Stat. 455), added, after the word "power" in section 4347, the following:

and the transportation of merchandise in any such vessel or vessels from one port of the United States to another port of the United States via any foreign port shall be deemed a violation of the foregoing provision.

It will be observed that section 3110 of the Revised Statutes, *supra*, relating to traffic on the northern frontiers, is broader than section 4347, relating to the coastwise traffic generally, even as amended by the act of February 15, 1893, in that section 3110 prohibits the use of foreign bottoms between ports of the United States, via a Canadian

port, for even a part of the voyage, while it might plausibly be claimed that section 4347, as amended, did not go so far.

The discovery of gold in Alaska made this defect in the law a matter of practical moment, for, as Alaska is separated from the United States proper by a great stretch of country belonging to Canada, a port in Alaska could, perhaps, not be deemed a "port in the United States on such frontiers" within the meaning of section 3110, Revised Statutes. To meet this situation the act of February 17, 1898, *supra*, was passed, which, while formally it supersedes section 4347, Revised Statutes, in substance amends it by adding the words "by water" after the word "transported," and the words "or for any part of the voyage," after the words "via a foreign port."

The act of February 17, 1898, was Senate bill No. 3580 (55th Cong., 2d sess.), Senator Frye, chairman of the committee reporting it, said in explanation of the necessity for its enactment (55th Cong. Rec., p. 1610):

* * * It is rendered necessary for this reason: Inquiries have just been made at the Treasury Department as to whether an American vessel could not take a cargo at Seattle and land it at Vancouver, ship it at Vancouver on an English vessel and the English vessel carry it up the rivers. That would be an evasion of the law, and this is to make it certain that it would also be a violation.

Mr. Payne, in explaining the provisions of the act to the House, made a similar statement (*ibid.* 1730), and the House report consisted entirely of a letter from the Secretary of the Treasury from which the following is quoted (*ibid.*, pp. 1729, 1730):

The essential amendment is in the words "or for any part of the voyage." The question has recently been put to the Treasury whether American goods consigned to Alaskan ports from Seattle can be carried in American vessels to Victoria, a distance of only 72 miles, and at Victoria be put on British vessels to be carried to Dyea, a distance of about 900 miles, or to St. Michael, a distance of about 2,000 miles. The Treasury Department has ruled that this is a violation of the laws reserving the coasting trade to American vessels. It is a palpable evasion of those laws, but in some quarters doubt is expressed whether the courts will not

decide, as they did in the case of a shipment of a cargo of nails from New York to Antwerp by a foreign vessel, and thence to San Francisco by another foreign vessel, that the law had been successfully evaded, not violated. That decision led to the amendment of Revised Statutes, section 4347, by the act of February 15, 1893, prohibiting shipment "via a foreign port." That amendment, however, does not, perhaps, fully cover the transaction here referred to. The policy of the United States is to confine carrying by water for the whole voyage between American ports to American vessels. It is believed that section 1 explicitly affirms that policy and removes all doubt.

During the debate in the House this colloquy occurred (*ibid.* 1730):

Mr. MOODY. Does this bill in any way affect the bonding privilege?

Mr. PAYNE. You mean with reference to the railroad-carrying trade? No; it refers entirely to goods brought in vessels and transferred to other vessels.

Mr. MOODY. Would it indirectly affect the bonding privilege?

Mr. PAYNE. I can not see how it would affect it in any way.

Mr. SIMPKINS, of Massachusetts. As I understand, this bill simply secures to American vessels the American coast-wise trade of Alaska?

Mr. PAYNE. That is the purpose of it, and that is all there is in it, as I understand it.

In addition, and for similar reasons, the act of June 19, 1886, *supra*, was reenacted as section 2 of the act of February 17, 1898, with an increase in the penalty from \$2 per passenger to \$200; a provision was inserted as section 3, dealing with the transshipment of goods at the mouth of the Yukon and other rivers; and section 3109 of the Revised Statutes was amended so as to apply to Alaska.

This account of the history of this legislation makes it clear that Congress did not have in mind in the act of February 17, 1898, anything further than the regulation of the coasting trade of the United States so as to prohibit the use of foreign bottoms for either passenger or freight traffic on a voyage or on any part of a voyage, by water, between ports of the United States. There is not a sign that anything further was thought of. The subject being

dealt with, namely, the coasting trade of the United States. the evasion of law sought to be forestalled, namely, the shipment to Victoria or Vancouver by vessel, and the transshipment there in another vessel to an American port, the addition to the former act of the words "by water" and "for any part of the voyage," the reenactment, as section 2, of an act providing for the transportation of passengers between ports or places in the United States by a foreign vessel, all show clearly that Congress had in mind a transportation which should be entirely by water, in vessels, and was simply endeavoring to prevent evasions of the coasting laws, by double billing through foreign ports, or by transshipment at such ports.

I have the honor, therefore, to advise you that the transportation to which you refer would not, in my judgment. violate the provisions of section 1 of the act of February 17, 1898.

Respectfully,

GEORGE W. WICKERSHAM.

The SECRETARY OF COMMERCE AND LABOR.

AIR RIFLES—ARMS AND MUNITIONS OF WAR.

Whether certain air rifles are "arms or munitions of war" within the meaning of the joint resolution of Congress passed March 14, 1912, and the President's proclamation of the same date issued in pursuance thereof, is purely a question of fact which the Attorney General does not feel qualified to decide.

DEPARTMENT OF JUSTICE,

January 6, 1913.

SIR: I am in receipt of your letter of 4th instant, transmitting correspondence referred to in it, and asking whether I am of opinion that air rifles are munitions of war within the meaning of the joint resolution of Congress, passed March 14, 1912, and the proclamation issued by the President in pursuance thereof.

In an opinion rendered you November 18, 1912 (29 Op. 570), while stating that, in my opinion, "paper caps for toy cap pistols could hardly be regarded as weapons of any

species used for the destruction of life," I suggested that "air rifles might well be employed for that purpose."

The Daisy Manufacturing Co., of Plymouth, Mich., objects to this suggestion, saying:

"* * * Our rifles should be classed as toys, as they do not shoot with enough force to break the skin, and we have never heard of a single instance where a person has been killed with an air rifle of any kind, and we have been giving the subject very close attention ever since we began the manufacture of air rifles, some 24 years ago."

This raises a question of fact which I do not feel qualified to decide. The practical definition of the term "arms and munitions of war," which I suggested in my letter to the President of March 25, 1912 (29 Op. 375), was "articles primarily and ordinarily used for military purposes in time of war, such as weapons of every species used for the destruction of life * * *." If air rifles of the character sought to be exported by the Daisy Manufacturing Co. are wholly innocuous and can not be used for the destruction of life, obviously they do not fall within the definition given. This, however, is, as I say, purely a question of fact, which I do not undertake to decide.

Respectfully,

GEORGE W. WICKERSHAM.

The SECRETARY OF STATE.

CIVIL SERVICE—PROMOTION OF MESSENGER BOY TO
LABORER.

Promotion from the position of messenger boy, in the classified nonapportioned service, to the position of laborer with classified duties, which is subject to the rule of apportionment, is prohibited by section 6 of Rule XI of the civil service rules.

An applicant by passing the civil-service examination does not acquire a vested right to promotion in accordance with the rules in force at the time the examination is held.

DEPARTMENT OF JUSTICE,
January 10, 1913.

SIR: I have the honor to acknowledge the receipt of your letter of November 15, 1912, requesting my opinion

upon certain questions arising in connection with the promotion of a messenger boy in your department. After stating that a disagreement has arisen between the Civil Service Commission and the Commissioner of Patents as to the authority of the latter to promote certain messenger boys, you say:

"The case in point is that of William N. Fisher, jr., who was appointed a messenger boy at \$360, in the Patent Office on December 27, 1909, and was promoted to the position of laborer at \$480 on June 17, 1912. To this promotion the Civil Service Commission takes exception, holding that Fisher was not eligible for promotion. The holding of the commission is based on section 6 of Rule XI of the Regulations of the Civil Service Commission, adopted September 18, 1909, and promulgated September 24, 1909. * * *

"Fisher was certified for appointment after the date of the promulgation of the said rule, and contends that when he took the civil-service examination, on December 5, 1908, for the position of messenger boy the rule in question was not in existence, and, further, that he took the examination with a distinct understanding, obtained from information furnished by the Civil Service Commission, that he could be promoted from the subclerical position which he was then seeking to other subclerical positions; and after two years' service in a subclerical capacity, would be allowed to take a promotion examination which, if he passed, would make him eligible for promotion to the clerical service, under rules of the commission existing then and now. The amended rule as promulgated on September 24, 1909, which was subsequent to the date of the examination taken by Fisher, is thought to be in the nature of an *ex post facto* regulation, and the reduction in his salary called for by the Civil Service Commission is apparently an illegal requirement. Fisher took the examination in good faith, being induced to do so by the opportunities offered for his advancement, and he should not now be deprived of his right by a rule adopted after he had complied with all of the regulations of the commission governing the admission of candidates for examination. It is believed that

Fisher is entitled to the promotion which has been given him, and is further entitled to enter an examination by the commission to determine his fitness for promotion to the clerical service.

" * * * When Fisher was appointed a messenger boy he was brought into a classified position in the nonapportioned service and his duties were of a classified character. His duties have not changed since his promotion to laborer."

You further state that the question involved affects 40 messenger boys in the Patent Office at salaries of \$360. and that owing to the ruling of the Civil Service Commission there is much dissatisfaction among them, as well as serious hindrance to the service because of difficulty of filling the positions of laborers from the civil-service registers.

With reference to this state of facts, you request my opinion upon the following questions:

"First. Was the promotion of William N. Fisher, jr. from the position of messenger boy at \$360 to laborer at \$480 authorized?

"Second. Is the undefined position of 'laborer' brought within the classified apportioned service by the promotion thereto of a messenger boy from the classified nonapportioned service?

"Third. Is a messenger boy appointed upon certification by the Civil Service Commission and now in the classified nonapportioned service eligible for promotion to another position, as that of laborer, in the nonapportioned service, the duties pertaining to each position being identical?"

Fisher's appointment as a messenger boy without regard to the rule of apportionment was authorized by section 2 of Rule VII of the Civil Service Rules, as amended September 18, 1909, which provides:

"Certification for appointment in the departments or independent offices at Washington shall be so made as to maintain, as nearly as the conditions of good administration will warrant, the apportionment of such appointments among the several States and Territories and the District of Columbia upon the basis of population: *Provided*. That

appointments to the following-named positions shall not be so apportioned, viz, plate printer, printer's assistant, skilled helper, and operative in the Bureau of Engraving and Printing; positions in the field service of the military staff departments and at Army headquarters, mail-bag repair shop, and mail-lock repair shop, Government Printing Office, pension agency, and local offices in the District of Columbia; apprentice, student, gardener, engraver, carpenter, cabinetmaker, painter, plumber, plumber's helper, electric wireman, electric lineman, electrician's helper, *and messenger boy.*"

Section 6 of Rule XI of the Civil Service Rules, as amended September 18, 1909, upon which the Civil Service Commission based its decision that Fisher was illegally promoted, provides:

"Messenger boys appointed without regard to the apportionment shall not be promoted or transferred to apportioned positions whether they are residents of States or Territories which are entitled to appointments to apportioned positions or not."

Whether Fisher's promotion was authorized depends upon whether the position of laborer to which he was promoted is an apportioned or a nonapportioned position. If it is an apportioned position his promotion clearly is in violation of section 6 of Rule XI.

Whether the position of laborer to which Fisher was promoted is subject to the rule of apportionment depends, in turn, upon whether it is a classified position, as under the civil service act and rules all classified positions are apportioned unless expressly excepted.

The civil service act (sec. 7) provides that a person "merely employed as a laborer or workman" shall not be required to be classified; and Rule II, section 1, of the Civil Service Rules excepts "persons employed merely as laborers" from the classified service. But, as said by Attorney General Bonaparte, in 27 Op. 217, "full effect must be given to the word 'merely,' as used in both the section of the law and the rule above mentioned. It is evidently contemplated in both cases that there may be laborers who discharge duties of a clerical, supervisory.

custodial, or other character distinct from mere manual labor. When such conditions exist to any extent, without any regard to the proportion of their time thus required in the discharge of such duties, the law permits their classification and the rule classifies them."

Section 5 of Civil Service Rule II, governing the appointment of laborers who are to perform classified duties, provides:

"Laborers who, in connection with their usual duties, are to perform work of the grade performed by classified employees, shall be appointed upon certification by the commission from appropriate registers of eligibles in the manner provided by these rules; and a person employed merely as a laborer or workman without examination under these rules shall not be assigned to work of the grade performed by classified employees."

This rule is extended by the following Executive orders:

"No person shall be appointed or employed in any executive department or office for the performance of any service of the character performed by classified employees, except in accordance with the provisions of the civil-service rules; and before making any appointment or employment for service with respect to which there may be reasonable doubt as to the requirement of examination the head of the department or office shall confer with the Civil Service Commission for the purpose of determining whether examination is required, and when such conference does not result in agreement the case shall be presented to the Attorney General for his opinion. (Executive order, November 29, 1904.)

"* * * Unclassified laborers may be assigned to classified work incidentally, but not as a part of their main work, in cases where such work can not be conveniently and economically done by classified employees, but never without the prior consent of the commission, obtained before such assignment, and with a view to the doing of the particular classified work in question by unclassified employees. (Executive order, April 21, 1909.)"

The effect of section 5 of Rule II obviously is to classify all positions of laborer to which are attached classified

duties. As a result they become apportioned positions, not being excepted in section 2 of Rule VII. In other words, the rule of apportionment attaches as an incident to such positions when they become classified.

The situation may be thus summarized: All positions in the executive civil service of the Government are classified and subject to the rule of apportionment unless specially excepted. The position of messenger boy is excepted from the rule of apportionment, but not from classification and the requirements incident thereto. Fisher has been promoted to the position of laborer, to perform classified work, and, under the civil-service act and rules, such a position is both classified and apportioned. His promotion is therefore in violation of section 6 of Rule XI.

The doubt on the subject seems to arise from the fact that the position of messenger boy, although classified, is excepted from the rule of apportionment, which fact suggests the thought that a laborer employed to do messenger work should not be subject to the rule of apportionment. But the important point is that, although the service to be performed is the same, the positions are different and subject to different regulations.

If, instead of filling the position of laborer here in question by promotion, an original appointment had been sought, the appointee to perform the duties of a messenger which you say are the present duties of Fisher, it is manifest that the incumbent would have had to come in as a classified employee and subject to the rule of apportionment.

The fact that the rule which prevents Fisher's promotion was not promulgated until after he had passed the civil-service examination has no legal bearing upon the question. He did not thereby acquire any vested right to promotion in accordance with the rules then in force. Besides, the new rule was in force when he was appointed.

While it may be that the rule will work a hardship in this case, and also result in inconvenience in your Department, these are proper considerations only for urging that it be modified, or that certain exceptions be made in its application.

16 *Eight-hour Law—Manufacture of Ammunition.*

What has been said disposes of all three questions presented.

Respectfully,

GEORGE W. WICKERSHAM.

The SECRETARY OF THE INTERIOR.

EIGHT-HOUR LAW—MANUFACTURE OF AMMUNITION.

The provision contained in the fortification act of June 6, 1912 (37 Stat. 127), relative to the eight-hour law applies only to employees, laborers, and mechanics *while* engaged in the work of manufacturing the ammunition named therein, and does not establish any general rule governing the employees of the contractor beyond their occupation in carrying out the work embraced in the contract with the Government.

DEPARTMENT OF JUSTICE,

January 15, 1913.

SIR: I have the honor to acknowledge the receipt of your letter of the 5th ultimo, in reference to the eight-hour provision in the act of June 6, 1912 (37 Stat. 125, 127), making appropriations for fortifications and other works of defense.

This act, as introduced in the House (H. R. 20, 111, 62d Cong., 2d sess.), contained no provision relating to eight-hour labor. In committee of the whole, Mr. Rauch offered two amendments on this subject, one relating to cannon, and one to ammunition (Cong. Rec., 62d Cong., 2d sess., vol. 48, pp. 2487, 2511), and, as the author himself announced that they were practically the same (*Ibid.*, 2511), they may be examined together.

That relating to cannon reads as follows:

" * * * *Provided*, That no part of this appropriation shall be expended for the purchase of any mountain, field, or siege cannon, including their carriages, from any person, firm, or corporation which has not at the time of commencement of said work established an eight-hour workday for all employees, laborers, and mechanics engaged or to be engaged in the work of construction of the cannon named herein. * * *"

The one dealing with ammunition reads:

" * * * *Provided*, That, except in time of war or when in the judgment of the President war is imminent, no part of this or of any other sum in this act for ammunition shall be expended for the purchase of any ammunition from any person, firm, or corporation which has not at the time of commencement of said work established an eight-hour workday for all employees, laborers, and mechanics engaged or to be engaged in the work of manufacturing the ammunition named herein."

It is to the latter amendment that you refer, and your specific inquiry is, whether its provisions should be construed so as to restrict their application to labor exerted in the production of the articles purchased from the appropriations affected by the proviso.

In the opinion of October 3, 1912 (29 Op. 534), to the Secretary of the Navy, to which you refer, a similar question was submitted involving the construction of the comprehensive eight-hour act of June 19, 1912. That act limited the eight-hour requirement to work "contemplated by the contract" with the Government, and provided that laborers and mechanics should not be required or permitted to work more than eight hours in any one calendar day "*upon such work*." It was held, accordingly, that the eight-hour limitation of that act only applied to Government work and not to work done for private individuals, and that, consequently, a laborer or mechanic could work more than eight hours a day, provided the time spent on Government work did not aggregate more than eight hours.

The eight-hour provisions of the fortification act relating to cannon and ammunition do not contain the specific language "upon such work" of the act of June 19, 1912, but merely limit the eight-hour requirement, in the one case to "employees, laborers, and mechanics engaged or to be engaged in the work of construction of the cannon named herein," and, in the other, to "employees, laborers, and mechanics engaged or to be engaged in the work of manufacturing the ammunition named herein," so that the opinion of October 3, 1912, *supra*, does not necessarily

apply. In other words, the language in the fortification act quoted above does not necessarily mean "*while engaged in the construction of the cannon or while manufacturing the ammunition*" but may merely denote the class of employees, etc., to which the act extends, and may act upon that class, so defined, in a way to establish a complete eight-hour workday as to it. Nevertheless, it is not an extreme presumption that Congress did not intend to establish one rule for all Government contracts generally, and another for contracts relating to cannon and ammunition, and the debates in the House on the fortification bill (Cong. Rec., 62d Cong., 2d sess., vol. 48, pp. 2487, 2511) show clearly that members supposed they were simply applying to cannon and ammunition the principles of the act approved June 19, 1912, which had recently passed the House, and was then pending in the Senate.

A consideration of the history of eight-hour legislation by Congress leads to the conclusion that all of this legislation, including the fortification act of June 6, 1912, is confined to Government work and does not and was not intended to affect work done on private contracts.

The first act relating to the subject was that of June 25, 1868 (Rev. Stat. sec. 3738), which provided:

"Eight hours shall constitute a day's work for all laborers, workmen, and mechanics who may be employed by or on behalf of the Government of the United States."

This act applied to persons employed by the Government, not to those employed by independent contractors (*United States v. Driscoll*, 96 U. S. 421), and it may be assumed did not attempt to regulate their hours of labor, except when employed on Government work. Yet the language used in the act is capable of the same construction which has been suggested above as to the language of the fortification act. The words "employed by or on behalf of the Government of the United States" may mean "*while employed*," etc., or may simply denote the class for which, however employed, an eight-hour workday is constituted. It is evident, however, that the act has always been deemed by those persons before whom it has come to be confined to Government work. (14 Op. 37; 18 Ibid. 389; *United States v.*

Martin, 94 U. S. 400; *United States v. Driscoll*, 96 U. S. 421.)

The act of June 25, 1868, was defective in two respects: First, it provided no penalty. Second, it did not extend to the case of Government work done by independent contractors, which was estimated to be 75 per cent of the total. Consequently the act of August 1, 1892 (27 Stat. 340), was passed, which strengthened the eight-hour provision in its application to laborers and mechanics employed by the United States, and extended the provision to laborers or mechanics employed "by any contractor or subcontractor upon any of the public works of the United States."

As remarked above of the act of June 25, 1868, the language of this later act of 1892 is capable of the construction that it applies to the laborers only *while employed* upon any of the public works of the United States, or that it merely denotes a class and establishes as to that class a complete eight-hour workday however employed.

The latter construction, however, was evidently not in the mind of Congress, which only contemplated an inclusion of additional Government work, not a regulation of hours of labor on private contracts.

The House report upon the act contained the following passages (H. R. Rept. No. 1267, 52d Cong., 1st sess., pp. 1, 6, and 7):

"The principle embraced in these measures and in the substitute herewith submitted is not new nor without the sanction of precedent. The authority of the Government, by law, to regulate and limit the hours of service of those in the immediate and direct employment of the Government is undisputed, nor is it contended that no authority exists in the Government that may be exercised to restrict and limit the hours that laborers may be employed upon the works of the Government under the employment of contractors for the doing of such works.

* * * * *

"It will be urged that the measure ought not to extend to laborers and mechanics in the employ of contractors and subcontractors with the Government, but should be limited to direct employments by the Government. When it is con-

sidered that the purpose of Federal legislation on this subject is to lend the influence and example of this Government to the authorities of States and municipalities, having a broader scope of jurisdiction in which to make the principle applicable; and when it is further considered that all the work of the Government in the construction of public buildings and 75 per cent of all other work of the Government, including river and harbor work, is now done by contract, and that if it was the desire of officials to evade the law every work, no matter how small, might be let by contract, the law would be a dead letter when enacted. If we wish by the example of this Government to make the application of the principle universal, we must ourselves extend it to the limit of the scope of our jurisdiction.

"* * * It will be contended by those who oppose any and all legislation upon this subject that the Government has no authority to prohibit the citizen from making what contract he may please concerning his personal service; that such provision is an unwarranted infringement of the natural rights of the citizen. Whatever might be the force of such argument, if the law was intended to affect contracts for service between individual citizens and relating to private work, we do not think the position is at all tenable when urged against this measure.

"The citizen has no natural right to demand any work from the Government, and if he obtains such work he must obtain it upon such terms as the Government sees fit to impose. As to its own work the Government has a lawful right to say that laborers thereon shall be employed for only one hour in the day, as it may lawfully provide that such laborer shall work any given number of hours; it can not compel the citizen to enter its employ, but it may prescribe the terms upon which he shall enter, if at all. Nor in any view is such provision an unwarranted interference with the natural rights of the citizen. If the objection were tenable, then the whole fabric of legislation looking to the regulation of the hours of labor would fall to the ground."

In the debate in the House Mr. Buchanan, of New Jersey, said (Cong. Rec., 52d Cong., 1st sess., vol. 23, p. 5727) :

"We are not laying down in this Congress a law for the whole industrial world. Our jurisdiction is limited. We can not legislate for the States. The States are rapidly legislating for themselves, and all in one direction. But we can say, in our position as national legislators, that this Government of ours, in its relations to its labor, shall observe the conditions of which I have spoken. So far as its employment is concerned an eight-hour day shall obtain. That is all that this bill seeks to do; and to do less than this is to do violence to humanity itself."

Mr. McKinney said (*abid.* 5727) :

"Mr. Speaker, several gentlemen who have argued against this measure have been assuming what is not contemplated by the bill. It should be understood by every Member of this House that we are legislating only with regard to employers of labor on Government work. As regards the results upon the general labor of the country outside of Government employment, that is a matter with which we have nothing to do."

Mr. Mutchler, in opposing the bill, assumed that laborers in the same plant would be engaged on Government work for eight hours and on work for private individuals for an additional time, and called attention to the confusion which would be thus caused (*ibid.* 5729).

In passing upon all the questions which have arisen under the act of August 1, 1892, the Attorneys General, so far as I am aware, have never considered that that act established an eight-hour workday except for Government work, and Judge Hanford expressly charged the jury to that effect in *United States v. Jefferson* (60 Fed. 736, 737).

The act of 1892, and similar acts, have been sustained by the courts on the theory, apparently, that they apply only to laborers, etc., while engaged on public work, and it is not to be presumed, without very clear language, that Congress intended to invade a field more appropriate for State action.

In *Atkin v. Kansas* (191 U. S. 207, 224), the court summed up its conclusion sustaining the constitutionality of the Kansas act as follows:

" * * * We rest our decision upon the broad ground that the work being of a public character, absolutely under the control of the State and its municipal agents acting by its authority, it is for the State to prescribe the conditions under which it will permit work of that kind to be done. Its action touching such a matter is final so long as it does not, by its regulations, infringe the personal rights of others; and that has not been done."

In the opinion of the Justices (208 Mass. 619, 623), the court gave the following reasons for sustaining a similar act of the Legislature of Massachusetts:

" * * * because it is in the power of the proprietor of a business to prescribe the methods in accordance with which it shall be conducted. This conclusion is supported by *Atkin v. Kansas*, 191 U. S. 207."

In *Ellis v. United States* (206 U. S. 246, 255, 256), the court sustained the act of August 1, 1892, upon the grounds stated in *Atkin v. Kansas*, *supra*, and added:

" * * * Congress, as incident to its power to authorize and enforce contracts for public works, may require that they shall be carried out only in a way consistent with its views of public policy, and may punish a departure from that way. It is true that it has not the general power of legislation possessed by the legislatures of the States, and it may be true that the object of this law is of a kind not subject to its general control. But the power that it has over the mode in which contracts with the United States shall be performed can not be limited by a speculation as to motives."

To the same effect is the language of Attorney General Moody in 25 Op. 441, 444, and that these views are also operative in Congress is shown by the Senate Report No. 2321, Fifty-seventh Congress, second session, quoted in 29 Op. 536 et seq.

Other Federal statutes relating to eight-hour labor are noticed in 29 Op. 372, 373, and it is only necessary to refer briefly to the naval appropriation acts of June 24, 1910

(36 Stat. 605, 628), and of March 4, 1911 (36 Stat. 1288). The former merely extended the provisions of the act of August 1, 1892, to contracts for the construction of naval vessels, to meet a ruling of the Attorney General that naval vessels, where the title has not passed to the United States, were not "public works" within the meaning of the act of August 1, 1892 (28 Op. 358, 360, 361).

The appropriation act of March 4, 1911, *supra*, adopted a different wording, which is similar to that in the paragraph of the fortification act now under consideration. It required the establishment of an eight-hour workday "for all employees, laborers, and mechanics engaged, or to be engaged, in the construction of the vessels named herein." This change of language, however, had no further purpose than to include those persons fabricating the parts of the vessel away from its situs, and to extend to them the benefits of the act of August 1, 1892 (29 Op. 284).

There is no evidence that Congress intended to go beyond the time employed in the work of constructing the vessel and to regulate the hours of labor outside of that period. (See 29 Op. 35.)

In the opinion to the Secretary of the Navy on December 21, 1911 (29 Op. 279), it was held that the above-mentioned act of March 4, 1911, prohibited the labor of employees, etc., more than eight hours in any one calendar day *in the construction of the vessels*, but there is no intimation in that opinion that the eight-hour provision extended to anything but Government work. On the contrary, the care that was taken to define what employees, etc., could be said to be engaged in the "construction of said vessels" shows that the opinion was limited to employees, etc., while engaged in work for the Government.

Answering your inquiry, therefore, the construction placed by me upon the act of June 19, 1912, relative to Government contracts is applicable to the fortification act of June 6, 1912. The provision contained in that act relative to the eight-hour law applies only to employees, laborers, and mechanics *while* engaged in the work of manufacturing the ammunition named therein, and does not establish any general rule governing the employees of

24 *Eight-hour Law—Printing and Binding Production.*

the contractor beyond their occupation in carrying out the work embraced in the contract with the Government.

Respectfully,

GEORGE W. WICKERSHAM.

The SECRETARY OF WAR.

EIGHT-HOUR LAW—ARTICLES OF PRINTING AND BINDING PRODUCTION.

Contracts for the purchase of the articles used in printing and binding production herein enumerated are excepted from the operation of the eight-hour law of June 19, 1912 (37 Stat. 137), being such articles as are usually bought in open market and in some instances being also classed as supplies for the Government.

DEPARTMENT OF JUSTICE,
January 21, 1913.

SIR: I have the honor to acknowledge the receipt of your letter of the 9th instant, inclosing a letter from the Public Printer and requesting an opinion as to the application of the act of June 19, 1912 (37 Stat. 137), regulating the hours of labor on Government work to certain contracts.

The specific questions submitted are as follows:

"1. Do the provisions of the act apply to contracts for the purchase of paper manufactured according to the standard of quality fixed upon by the Joint Committee on Printing for the public printing and binding?

"2. Do the provisions of the act apply to contracts for the purchase of bookbinding leathers, bookcloths, canvas, duck, drilling, corduroy, gold leaf, aluminum leaf, thread, twine, stitching-machinery wire, glue, marbler's colors, printing inks, refined lead, tin, antimony, copper battery plates, tin foil, chemicals, cotton cloth, belts, varnish, linseed oil, cartons or containers for packing postal cards, paper boxes, and such other similar articles used in printing and binding production as may be required from time to time in the process of manufacture?

"3. Do the provisions of the act apply to the reproduction of maps, drawings, photographs, etc., by photolitho-

graph, lithograph, photo-engraving, or other processes as may be required from time to time and ordered by the Public Printer in the open market or under formal contracts for use in Government publications?

"4. Do the provisions of the act apply to purchases made by the Public Printer, in the open market or under formal contracts, of printing and binding machinery generally manufactured for sale commercially or specially built upon specifications prepared for meeting a particular method of production for the Government Printing Office?"

In my opinion, all the contracts referred to in said questions are excepted from the purview of section 1 of said act by section 2 thereof, which provides, in part, as follows:

"Sec. 2. That nothing in this act shall apply to contracts for transportation by land or water, or for the transmission of intelligence, or for the purchase of supplies by the Government, whether manufactured to conform to particular specifications or not, or for such materials or articles as may usually be bought in open market, except armor and armor plate, whether made to conform to particular specifications or not, or to the construction or repair of levees or revetments necessary for protection against floods or overflows on the navigable waters of the United States: * * *

It is my judgment that the contracts referred to in question 4 are "for such materials or articles as may usually be bought in open market," and that the contracts referred to in questions 1, 2, and 3 are of the same class and are also "for the purchase of supplies by the Government."

As said in the opinion of October 3, 1912, to the Secretary of the Navy (29 Op. 534, 543) the terms "supplies" and "such materials or articles as may usually be bought in open market," are, in a sense, synonymous. The latter term, however, appears to be the larger, including supplies and something more. In the construction of either term, however, any article or material which can fairly be said to be included, in its ordinary condition, within the class of supplies, or articles which may usually be bought in open market, is excepted from the operation of the act. no matter if it may differ in particulars from other mem

bers of the class by reason of the requirements of the specifications under which it is contracted for. The exceptions can have no other meaning and were enacted for this very purpose. For instance, paper, in its ordinary state, evidently belongs to the class of "supplies," and it is not withdrawn therefrom because "manufactured according to the standard of quality fixed upon by the Joint Committee on Printing."

Printing presses are articles such as may ordinarily be bought in open market, and they do not cease to be printing presses because made to meet peculiar needs. They still remain in the excepted class, differing from their fellows in the class only because "made to conform to particular specifications."

Certain debates in the House on this subject are quoted in 29 Op. 534, *supra*, at pages 539 to 542. In addition, I quote the following pertinent remarks by Members of the House on this subject, it being premised that Mr. Wilson, of Pennsylvania, was in charge of the bill for the Committee on Labor:

"Mr. MADDEN. Will the gentleman be kind enough to explain what the phrase 'usually obtained in the open market' would mean, as he understands it?

"Mr. WILSON of Pennsylvania. Mr. Speaker, the term must of necessity be indefinite in order to accomplish the purpose and to leave as a matter of administration the accomplishment of that purpose. In the purchase of supplies, for instance, contracts for which the Government enters into, it is an impossibility to follow those things back to the original source of their production in many cases and yet they may usually be bought in the open market. It would be difficult to specify in a bill just the number of articles and the kind of articles that would be included in that kind of a condition, and it can only be left as a matter of administration, unless you propose to include the production of all supplies in an eight-hour proviso, which is not the intent or purpose of the committee.

"Mr. MADDEN. Let me put a concrete question to the gentleman and ask him to explain it. Suppose that the gentleman himself entered into a contract with the Govern-

ment of the United States to build any kind of a structure, say, and in the course of the erection of the structure which he entered into a contract to erect he required the use of a large amount of lumber. Would the purchase of that lumber be permitted under this contract unless the lumber was produced under the eight-hour day?

"Mr. WILSON of Pennsylvania. In my judgment that matter would be left purely as a question of administration. It is not specifically provided in this measure that it should include the lumber, as suggested by the gentleman from Illinois. It would be a matter that would be determined by the administration in making its contract. [Con. Rec., 62d Cong., 2d sess., vol. 48, p. 381.]

* * * * *

"Mr. MADDEN. I take it the intention is that raw material which enters into the construction of a building would be considered as materials which could be bought on the open market.

"Mr. WILSON of Pennsylvania. In a general way that would be my construction.

"Mr. MADDEN. And finished material made from the raw material would be required to be made under the provisions of this bill.

"Mr. WILSON of Pennsylvania. I did not quite catch that.

"Mr. MADDEN. Finished materials, materials which would require mechanical work after the raw material had been purchased, would not enter into the construction of a building at all except under this bill.

"Mr. WILSON of Pennsylvania. I should judge so.

"Mr. MADDEN. Suppose, for example, a man had a contract to construct a building which would require a lot of rough stone or brick and also a lot of cut stone finished. He could go out in the open market, or anybody could, and buy the raw material, and he could get it in the open market, but he could not go into the market and buy the finished material, the dressed material, because dressed material would have to be made in accordance with the provisions of the specifications under the contract; so that I

take it that the bill would require the finished material to be made in accordance with the provisions of this law, while the rough material which might enter into the construction of a building would not be so required.

"Mr. WILSON of Pennsylvania. *My judgment is that finished material would be simply material they have bought in the open market under certain specifications, and it would be exempt from the operation under this clause of the bill.* [Ibid. 382.]

* * * * *

"Mr. CANNON. * * * Now, as I understand it, under the provisions of the bill the doors of a public building, the cornices, the tiling that would cover it, might conform to particular specifications and not be subject to the eight-hour law, if I understand the provisions of the bill. Am I right?

"Mr. WILSON of Pennsylvania. If they are of that nature that they could usually be bought in the open market, then they would not be required to conform to this eight-hour proviso, but if they are of the nature that they can not usually be bought in the open market, then they would be required to comply with the provisions of the law.

"Mr. HUGHES of New Jersey. * * * When you say that any work that is to be done by the Government shall be done according to an eight-hour day, then you enter upon a field which is absolutely amazing in its scope. The Government has stationery made for it, has pencils made for it, and purchases pens, chairs, carpets, cuspidors—practically everything that anybody purchases. It became obvious to the friends of this legislation that some sort of a limitation must be put on the application of this law so far as the purchases by the Government are concerned. That particular exception was drawn, as I recollect it now, by a gentleman named Andrew Faruseth, and, as I read it and as I think its author intended it, it excepts practically everything that is of such a character as to make the application of the law to it impossible. By putting a limitation on the exception itself they have taken from without the exception armor plate. *I think that anything practically*

*that the Government ordinarily buys can be bought in the open market and made to conform to particular specifications, and does not come within the provisions of this law. * * **

* * * *

“Mr. HUGHES of New Jersey. * * * Great objection was made by gentlemen coming before the committee that if this law was to apply to the purchase of supplies the Government could not buy canned tomatoes or canned peaches or pears for its soldiers unless the tomatoes, peaches, and pears had been canned under the eight-hour law; that the Government could not purchase uniforms for soldiers unless the cloth had been manufactured under the terms and provisions of the eight-hour law. And the friends of the legislation realized that such interpretations, which perhaps were correct interpretations, of the proposed language, would make the law ridiculous. *And they realized that this law in order to operate at all must be made to operate within very narrow limits. As I say, when they put this exception in the bill it practically shut off from the operations of the act nearly everything that the Government is called upon ordinarily to purchase. However, they retained the right to have this law apply to armor plate, and, in my judgment, with the exception of armor plate, battleships, and things of that character there is nothing that the Government can purchase and apply the operation of this law to in that section.*

“Mr. CANNON. Or a subcontractor, in the making of brick or doors or tile, can make them without violating the law.

“Mr. HUGHES of New Jersey. Exactly. Made to conform to particular specification.” [Ibid. pp. 382, 383.]

Mr. Hughes, of New Jersey, then quoted from the message of the President of December 6, 1910, as follows:

“It seems to me from the past history that the Government has been committed to a policy of encouraging the limitation of the day's work to eight hours in all works of construction initiated by itself, and it seems to me illogical to maintain a difference between Government work done on

30 *Eight-hour Law—Printing and Binding Production.*

Government soil and Government work done in a private establishment, *when the work is of such large dimensions and involves the expenditure of much labor for a considerable period, so that the private manufacturer may adjust himself and his establishment to the special terms of employment that he must make with his workmen for this particular job. To require, however, that every small contract of manufacture entered into by the Government should be carried out by the contractor with men working at eight hours would be to impose an intolerable burden upon the Government by limiting its sources of supply and excluding altogether the great majority of those who would otherwise compete for its business.*

"Mr. KENDALL. Will the gentleman yield for a question?

"Mr. HUGHES of New Jersey. Certainly.

"Mr. KENDALL. These are exceptions which the President has stated are incorporated in the bill?

"Mr. HUGHES of New Jersey. These are the exceptions that have been in all proposed labor bills since I have been in Congress.

"Mr. KENDALL. *And they are now at present in this bill.*

"Mr. HUGHES of New Jersey. They are at present in this bill. * * * " [Ibid. 384, 385.]

It will be seen from this that the intent of the exceptions under consideration was to exclude from the operation of the act all ordinary contracts of the Government, including within the act only those contracts of a character which will permit the contractor, as a practical matter, to adjust his plant or force to the basis of an eight-hour work-day, and thus, on the one hand, render the law effective and, on the other, allow the Government the benefit of large, open competition in the letting of contracts.

Respectfully,

GEORGE W. WICKERSHAM.

The President.

EIGHT-HOUR LAW—CONSTRUCTION OF PUBLIC BUILDINGS.

The eight-hour workday restriction of the act of June 19, 1912 (37 Stat. 137), known as the eight-hour law, applies to the employment of labor on the work contemplated by the contract, and it is immaterial by whom the labor is employed, whether by a contractor, subcontractor, or sub-subcontractor.

Contracts excepted from the operation of the eight-hour law need not contain the eight-hour stipulation.

When contracts are made by letters of proposal and acceptance, the latter should contain the eight-hour stipulation.

Contracts for the purchase of the materials and articles entering into the construction of public buildings herein enumerated are excepted from the provisions of the eight-hour law.

(Opinion of January 21, 1913 (30 Op. 24), followed.)

DEPARTMENT OF JUSTICE,

January 22, 1913.

SIR: I have the honor to acknowledge the receipt of your letter of the 7th instant, inclosing copies of opinions rendered by the Solicitor of the Treasury December 11 and 17 last, in reference to the application of the act of June 19, 1912 (37 Stat. 137), regulating the hours of labor on Government work, to contracts let by your Department for the construction of public buildings.

You ask to be advised whether I concur in the views expressed by the Solicitor of the Treasury; and, if not, what my opinion is upon the questions submitted.

Referring to your letter to the Solicitor of December 11 last, as containing the matters on which you seek an opinion, your questions are, first:

“Does the term subcontractor, as employed in said act of June 19, 1912, refer to the person, firm or corporation in direct contractual relations with the contractor, or does it embrace as well subcontractors of such subcontractors, and so on indefinitely?”

The act of June 19, 1912, provides, in so far as pertinent to this matter, as follows:

“* * * That ever contract hereafter made to which the United States, any Territory, or the District of Columbia is a party, and every such contract made for or on behalf of the United States, or any Territory, or said Dis-

32 *Eight-hour Law—Construction of Public Buildings.*

strict, which may require or involve the employment of laborers or mechanics shall contain a provision that no laborer or mechanic doing *any part of the work contemplated by the contract*, in the employ of the contractor or *any subcontractor contracting for any part of said work contemplated*, shall be required or permitted to work more than eight hours in any one calendar day *upon such work*; and every such contract shall stipulate a penalty for each violation of such provision in such contract of five dollars for each laborer or mechanic for every calendar day in which he shall be required or permitted to labor more than eight hours *upon said work*; * * *

It is clear that the above enactment is aimed at the employment of *labor* on the work contemplated by the contract, and it is immaterial, from the point of view of the general purpose of the statute, by whom the labor is employed, whether by a contractor, by a subcontractor, or by a sub-subcontractor. The term "subcontractor" is broad enough to cover any person employing labor under a sub contract on the work contemplated by the original contract. If the contractor for the erection of a public building should sublet the entire contract to another who, in his turn, should sublet the entire contract to a third person, the employment by the latter of laborers for more than eight hours in any one calendar day would clearly, in my opinion, violate the letter and the spirit of the statute.

Your second question is as follows:

"Is it required that *all* contracts involving the employment of laborers or mechanics shall contain the provision referred to, or only those which do not come within the exceptions contained in said act?"

While the first section of the act provides that "*every contract*" thereafter made for or on behalf of the United States shall contain the stipulation as to eight-hour labor, the second section provides "that *nothing* in this act" shall apply to contracts within the classes excepted by said second section. Therefore, the requirement as to the insertion in the contract of a provision as to eight-hour labor does not apply to the excepted classes, and I answer your second question in the negative.

Your third question is as follows:

"Is it required that the stipulation referred to be included in letters of acceptance when informal contracts—made by proposal and acceptance—are entered into?"

As a contract made by letters of proposal and acceptance is as much a contract as a formal agreement, I answer your third question in the affirmative.

Your fourth question is as follows:

"In the construction and equipment of public buildings certain articles are required which the Department has hitherto contracted to have manufactured to conform to certain specification requirements, but which articles, in their respective classes, can be purchased in the open market. For instance, lamp standards and brackets. These are articles of common use and can be purchased in the open market, but this Department contracts for the manufacture of such as it requires, from drawings prepared by the Department, and requires the contractor to agree that he will not make for any other customer any lamp standards or brackets from these drawings, either during the continuance of his contract with the Government or after its termination. Again, dynamos and engines are purchasable in the open market, but those installed in public buildings while they resemble in appearance the dynamos and engines prepared by the respective manufacturers and are identical with those to be had in the open market, up to a certain point are, in certain essentials, required to be constructed on lines which constitute a material difference in construction.

"Tiles for roofing, terra cotta, bricks, plaster, are among materials which can be purchased in the open market, but might happen to be so produced as to be intended from the very commencement of the manufacturing process, for use in connection with a particular Government building contract. Are all of the foregoing classes excluded from the provisions of the act of June 19, 1912, by virtue of the exceptions therein contained?"

"Structural iron and steel are procurable by open-market purchase, but stock materials are not often used in public

building work. On the contrary, beams are rolled and columns fabricated for use in connection with a particular building, holes drilled for the rivets, etc. Again, sash, doors, moldings, etc., are procurable in the open market, but generally all the lumber for the interior finish of a public building is prepared in the mill of a subcontractor. Do these classes of material come within the operation of the law, and if so, is the law applicable to any stage of manufacture anterior to the point where those processes are begun which destine the materials for use in connection with the Government contract?

"It is thought that the classes of materials and articles above referred to afford sufficient illustration so that if you will favor the Department with your views, it will be possible for the Department to apply such principles as you may lay down to the other materials and articles entering into the construction of public buildings."

The question whether contracts for the purchase of such articles as those referred to in your fourth question are within the classes excepted from the operation of the first section of the act by the second section thereof, as being either contracts "for the purchase of supplies by the Government, whether manufactured to conform to particular specifications or not," or "for such materials or articles as may usually be bought in open market, * * * whether made to conform to particular specifications or not," is discussed in an opinion recently rendered to the President for the use of the Public Printer. I content myself, therefore, with handing you a copy of that opinion, and advising you that, for the reasons therein stated, contracts for the articles or materials to which you refer are all, in my judgment, within the excepted classes, and are, therefore, not subject to the provisions of section 1 of the act of June 19, 1912.

Respectfully,

GEORGE W. WICKERSHAM.

THE SECRETARY OF THE TREASURY.

CENTRAL BRANCH UNION PACIFIC RAILROAD.

With respect to the status of the claim of the United States against the old Central Branch Union Pacific Railroad, now constituting a part of the Missouri Pacific System, on account of the subsidy bonds issued by the Government in aid of the construction of said road, *held:*

- (1) That the property of the company is not now subject to a first lien in favor of the Government to secure the payment of the amounts paid by the United States, since the act of July 2, 1864, expressly subordinated the lien of the United States to the lien of the first-mortgage bonds;
- (2) That the Government has no right to demand the annual payment of 5 per cent of the net earnings of the company, because the right to the 5 per cent of the net earnings was intended as a security and sinking fund for the Government's loan, and, therefore, its existence depends upon the existence of the debt;
- (3) That the Government has no right to withhold the entire compensation earned by the company for transportation services;
- (4) That the Government still has the right to retain one-half of this compensation;
- (5) That the Government still has the right of a junior mortgagee to redeem.

DEPARTMENT OF JUSTICE,

January 27, 1913.

SIR: Last March you referred to me a letter from the Secretary of the Treasury, which laid before you the results of an investigation, in a report made to him by the Solicitor of the Treasury, on the present status of the claim of the United States against the Central Branch Union Pacific Railroad on account of subsidy bonds. This report recommended certain action to be taken, based upon the assumption that the Government still retains a first lien upon so much of the Missouri Pacific Railroad as is embraced in the old Central Branch Union Pacific Railroad, being the 100 miles of road extending from Atchison to Waterville, Kans., on account of the subsidy loan in the form of bonds issued and paid by the Government to aid in the construction of said road.

I have had this opinion and the questions involved in it very carefully studied in this Department, with the result that we are unable to agree with the conclusions of the Solicitor of the Treasury.

Briefly speaking, the facts in the case are these:

The act of July 1, 1862 (12 Stat. 489), "An act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the Government the use of the same for postal, military, and other purposes," the enabling act, so to speak, for the Pacific railroads, in section 13, authorized the Hannibal & St. Joseph Railroad Co., of St. Joseph, to extend its railroad from St. Joseph via Atchison for 100 miles westward into Kansas, and to use for this purpose any charter that may, or may have been, granted by the legislature of Kansas.

In 1863 this company assigned all of its rights under the act of 1862 to the Atchison & Pikes Peak Railroad Co., a corporation of the State of Kansas, the name of which was changed to Central Branch of the Union Pacific Railroad Co. by an act of July 1, 1867, passed by the legislature of Kansas. Under this assignment from the Hannibal & St. Joseph Railroad Co. the Atchison & Pikes Peak Railroad Co., at first under its original name, and later under its new name, and in accordance with the terms and conditions of the act of 1862 and its subsequent amendments, constructed 100 miles of railroad and telegraph lines, as authorized, from Atchison to Waterville, Kans. In the course of this construction the company received from the Government, as provided in the above acts, \$1,600,000 face value, 30 years 6 per cent subsidy bonds. These bonds were delivered in 5 installments upon the completion of successive 20-mile sections of railroad, as follows:

\$320,000 face value on July 27, 1866.

\$320,000 face value on December 7, 1866.

\$320,000 face value on May 2, 1867.

\$320,000 face value on December 4, 1867.

\$320,000 face value on January 21, 1868.

Prior to the issue of these bonds, and on May 1, 1865, and in advance of construction, the company issued \$1,600,000 face value of its own 30-year 6 per cent bonds secured by a first mortgage upon the whole of said 100 miles of railroad, telegraph lines, and properties under the authority

granted by Congress in the acts of July 2, 1864 (13 Stat. 356, section 10), and of March 3, 1865 (13 Stat. 504), amending the act of 1862.

Default was made in the payment of principal and interest on these bonds in May, 1895, and shortly thereafter a suit to foreclose was instituted in the United States Circuit Court for the District of Kansas by Samuel Carr, the surviving trustees under the mortgage or trust deed given to secure the company's bonds.

The sum of \$2,786,188.70 was found due the bondholders for principal and interest, and on February 14, 1898, a final decree was entered directing the sale of all the properties. A sale for \$2,350,000 resulted, which was confirmed by the court June 27, 1898, and shortly thereafter a deed conveying the whole property was made to the purchasers. The property was subsequently turned over to a newly organized Kansas corporation for which the purchase had been made, and now constitutes a part of the Missouri Pacific System.

The question now raised in the memorandum report of the Solicitor of the Treasury relate to the effect of the company's issue of its own bonds and the execution and foreclosure of the mortgage given to secure them upon the lien and security given to the Government in the act of 1862 and its subsequent amendments.

The act of 1862 (12 Stat. 489) provided that the word "company" whenever used should be taken to include its "associates, successors, or assigns." The provisions relating specifically to the subsidy bonds are as follows:

"*SEC. 5. And be it further enacted*, That for the purposes herein mentioned the Secretary of the Treasury shall, upon the certificate in writing of said commissioners of the completion and equipment of forty consecutive miles of said railroad and telegraph, in accordance with the provisions of this act, issue to said company bonds of the United States of one thousand dollars each, payable in thirty years after date, bearing six per centum per annum interest, (said interest payable semiannually,) which interest may be paid in United States Treasury notes or any other money or currency which the United States have or

shall declare lawful money and a legal tender, to the amount of sixteen of said bonds per mile for such section of forty miles; and to secure the repayment to the United States, as hereinafter provided, of the amount of said bonds so issued and delivered to said company, together with all interest thereon which shall have been paid by the United States, the issue of said bonds and delivery to the company shall ipso facto constitute a first mortgage on the whole line of the railroad and telegraph, together with the rolling stock, fixtures and property of every kind and description, and in consideration of which said bonds may be issued; and on the refusal or failure of said company to redeem said bonds, or any part of them, when required so to do by the Secretary of the Treasury, in accordance with the provisions of this act, the said road, with all the rights, functions, immunities, and appurtenances thereunto belonging, and also all lands granted to the said company by the United States, which, at the time of said default, shall remain in the ownership of the said company, may be taken possession of by the Secretary of the Treasury, for the use and benefit of the United States: *Provided*, This section shall not apply to that part of any road now constructed.

“*SEC. 6. And be it further enacted*, That the grants aforesaid are made upon condition that said company shall pay said bonds at maturity, and shall keep said railroad and telegraph line in repair and use, and shall at all times transmit dispatches over said telegraph line, and transport mails, troops, and munitions of war, supplies, and public stores upon said railroad for the Government, whenever required to do so by any department thereof, and that the Government shall at all times have the preference in the use of the same for all the purposes aforesaid (at fair and reasonable rates of compensation, not to exceed the amounts paid by private parties for the same kind of service); and all compensation for services rendered for the Government shall be applied to the payment of said bonds and interest until the whole amount is fully paid. Said company may also pay the United States, wholly or in part, in the same or other bonds, Treasury

notes, or other evidences of debt against the United States, to be allowed at par; and after said road is completed, until said bonds and interest are paid, at least five per centum of the net earnings of said road shall also be annually applied to the payment thereof."

These particular provisions were amended by the act of 1864 (13 Stat. 356), as follows:

"SEC. 5. *And be it further enacted*, That the time for designating the general route of said railroad, and of filing the map of the same, and the time for the completion of that part of the railroads required by the terms of said act of each company, be, and the same is hereby, extended one year from the time in said act designated; and that the Central Pacific Railroad Company of California shall be required to complete twenty-five miles of their said road in each year thereafter, and the whole to the state line within four years, and that only one half of the compensation for services rendered for the Government by said companies shall be required to be applied to the payment of the bonds issued by the Government in aid of the construction of said roads."

"SEC. 10. *And be it further enacted*, That section five of said act be so modified and amended that the Union Pacific Railroad Company, the Central Pacific Railroad Company, and any other company authorized to participate in the construction of said road, may, on the completion of each section of said road, as provided in this act and the act to which this act is an amendment, issue their first mortgage bonds on their respective railroad and telegraph lines to an amount not exceeding the amount of the bonds of the United States, and of even tenor and date, time of maturity, rate and character of interest with the bonds authorized to be issued to said railroad companies respectively. And the lien of the United States bonds shall be subordinate to that of the bonds of any or either of said companies hereby authorized to be issued on their respective roads, property, and equipments, except as to the provisions of the sixth section of the act to which this act is an amendment, relating to the transmission of despatches and the transportation of mails, troops, munitions of war, supplies and public

stores for the Government of the United States. And said section is further amended by striking out the word ' forty,' and inserting in lieu thereof the words ' on each and every section of not less than twenty.' ” * .

The act of 1865 (13 Stat. 504) in turn provided that the company's own bonds might be issued in advance of construction.

The act of March 3, 1871 (16 Stat. 525), amended the act of 1862 by directing the Secretary of the Treasury to pay over in money to the railroad companies mentioned therein and performing services to the United States one-half of the compensation provided by law for such services theretofore or thereafter rendered. But the act of March 3, 1873 (17 Stat. 508), now sections 5260-5261, Revised Statutes, directed the Secretary of the Treasury to withhold all payments to any railroad company and its assigns on account of freights or transportation, over their respective roads, of any kind, to the amount of payments made by the United States for interest upon bonds of the United States issued to any such company, and which shall not have been reimbursed, together with 5 per cent of the net earnings due and unapplied as provided by law; and provided that any such company might bring suit in the Court of Claims to recover the price of such freight and transportation as might appear from the law and the facts to be due to the company.

Sections 5 and 6 of the act of 1862 as amended by sections 5 and 10 of the act of 1864 show plainly that the Government was given a threefold security in addition to the condition subsequent that the bonds should be paid at maturity:

- (1) A preferential right to transportation, including the right to withhold one-half of the compensation due for such services.

- (2) A right upon completion of the road to an annual payment of 5 per cent of the net earnings.

- (3) A mortgage upon the whole property of the road.

Section 10 of the act of 1864, however, subordinated the Government's lien and security, except for certain pro-

visions relative to the Government's right to transportation contained in section 6 of the act of 1862.

Relative to this whole transaction, the Supreme Court has held that none of these acts imposed upon the company an obligation to pay either principal or interest until maturity, and on this ground it was held that in a suit brought by the company under the act of 1873 for one-half of the compensation due for services rendered the Government, the Government had no right to set off unpaid interest against this claim since there was no obligation upon the company to pay current interest. *United States against Union Pacific Railroad Co.* (91 U. S. 72).

The same court has held that when the Government subordinated this lien by the act of 1864, it also subordinated its whole debt, and on this ground decided that the holders of the company's first mortgage bonds, to which it had given priority over its own debt and security, were entitled to payment of interest out of net earnings in priority to the payment of 5 per cent net earnings due the Government. *Union Pacific Railroad Company against United States* (99 U. S. 402).

The effect of the act of 1864, therefore, was to displace and subordinate the Government's position as creditor except to the extent that the Government's priority was expressly reserved.

The Solicitor of the Treasury contends, nevertheless, that these obligations of the mortgagor company ran with the land into the hands even of *bona fide* purchasers at the foreclosure sale under the mortgage issued to secure the company's own bonds, pursuant to the act of 1864. He, therefore, maintains that the Government is entitled (1) to withhold all compensation earned by the company by transportation services rendered the Government; (2) to demand the annual payment of 5 per cent out of the net earnings; (3) to demand payment of the whole debt, principal and interest; and (4) to redeem the property.

I differ with the solicitor, and upon the facts stated I am of the opinion—

1. That the property is not now subject to a first lien in favor of the Government to secure the payment of the

amounts paid by the United States. The act of July 2, 1864, above cited, expressly subordinated the lien of the United States to the lien of the "new first mortgage bonds" to be issued.

The present holders take their title under the foreclosure of the mortgage made to secure those very "new first mortgage bonds." This was squarely decided in the case of *Union Pacific Co. v. United States* (99 U. S. 402-427).

2. The Government has no right to demand the annual payment of 5 per cent of the net earnings.

This follows from proposition 1, because the right to the 5 per cent of the net earnings was intended as a security and sinking fund for the Government's loan, and, therefore, its existence depends upon the existence of the debt. *Union Pacific Co. v. United States* (99 *supra*).

3. The Government has no right to withhold the entire compensation earned by the company for transportation services.

The authority adduced to support this claim is the act of March 3, 1873 (secs. 5260 and 5261, Revised Statutes), which, however, is obviously a provision for a set-off against a debt, and it was so squarely held in the first of the Union Pacific cases on this general subject. *United States v. Union Pacific* (91 U. S. 72).

4. The Government still has the right to retain one-half of this compensation.

This proposition was decided by Attorney General Griggs (22 Op. 396) and has always been accepted without controversy.

5. Also, it appears that the United States still has the right of a junior mortgagee to redeem.

Whether or not the United States could have been brought by process into the foreclosure proceedings (which occurred in 1898) may be doubtful. The consent to be sued might, perhaps, be found in the Tucker Act (24 Stat. 505), section 1, subsection 1, especially in connection with section 4 of the act of March 3, 1887 (24 Stat. 491), which directs the Attorney General to "defend the rights and interests of the United States in respect of the matters in this section mentioned (redemption of paramount liens,

etc.), and to take steps to foreclose any mortgages or liens of the United States on any such railroad property." Act of March 3, 1887, section 4 (24 Stat. 491).

It is doubtful whether, irrespective of these provisions, the United States could compulsorily have been made a defendant. (*Jones on Railroad Securities*, 3d Ed. par. 400; *Hill v. U. S.*, 9 How. 385; *United States v. McLemore*, 4 How. 286; *Elliot v. Van Voorst*, 3 Wall. Jun. 299; *Fifth National Bank v. Long*, 7 Biss. 502; *Meier v. Kans. Pac. Ry.*, 4 Dill, 378.)

But this is really immaterial, because even if it could have been made a party, it was not in fact made a party, and, therefore, it has the usual right of a junior mortgagee who has not been a party to the foreclosure of a prior lien, which is a right to redeem under conditions. (*Noyes v. Hall*, 97 U. S. 34; *Gordon v. Hobart*, 10 Fed. Cas. No. 5609; *Gage v. Brewster*, 31 N. Y. 218; *Jones on Railroad Securities*, 3d. Ed. 441; *Barrett v. Blackmar*, 47 Iowa, 565, 571; *Douglass v. Bishop*, 27 Iowa, 214, 216; 27 Cyc. 1578, collecting a large number of cases.)

Attorney General Griggs did consider the advisability of redeeming this very property, but felt that at that time its value was not sufficient to provide an adequate equity (22 Op. 398).

The figures as given by the Report of the Solicitor of the Treasury (pp. 52, 54) would seem to indicate a fairly substantial equity in the property at its present valuation over and above the amounts which the Government would have to allow as preliminary to its right to redeem.

While the data is not sufficient to compute just what the equity would be, it would seem probable that there is a substantial balance which might be recovered either by actual resale or through a settlement. But that is a question for the Secretary of the Treasury to determine upon investigation of the facts which I have not before me. It is, therefore, sufficient for me to say that for the reasons which I have briefly expressed, I am unable to concur with the recommendations of the Solicitor of the Treasury.

Respectfully,

GEORGE W. WICKERSHAM.

THE PRESIDENT.

44 *Foreign Vessels—Transportation of Passengers.*

FOREIGN VESSELS CARRYING PASSENGERS FROM SAN JUAN TO NEW YORK.

The transportation of passengers by foreign vessels from San Juan, Porto Rico, to the port of New York, notwithstanding the fact that the passengers go ashore for brief stays at intervening foreign ports, is a violation of section 8 of the act of June 19, 1886 (24 Stat. 81), as amended by section 2 of the act of February 17, 1898 (30 Stat. 248).

DEPARTMENT OF JUSTICE,
February 1, 1913.

SIR: I have the honor to acknowledge the receipt of your letter of the 10th ultimo, requesting an opinion whether the transportation of passengers by foreign vessels from San Juan, Porto Rico, to New York is a violation of section 8 of the act of June 19, 1886, as amended by section 2 of the act of February 17, 1898, under the circumstances set forth in a letter from the collector of customs at San Juan, inclosed in your communication.

It appears that the Hamburg-American Line, operating foreign vessels, has put in effect a series of cruises for tourists from New York and return to various ports in the West Indies and in South America. The vessels in the course of the voyage stop at Habana, San Juan, Kingston, and other places to enable the passengers to go ashore for brief stays. It frequently happens that persons in Porto Rico desire to take advantage of the coming of these tourist steamers by joining the vessel at San Juan for the remainder of the voyage, disembarking at the port of New York, it being their intention to make that port the final termination of their voyage.

Section 8 of the act of June 19, 1866 (24 Stat. 79, 81), as amended by section 2 of the act of February 17, 1898 (30 Stat. 248), provides:

"SEC. 8. No foreign vessel shall transport passengers between ports or places in the United States, either directly or by way of a foreign port, under a penalty of two hundred dollars for each passenger so transported and landed."

That San Juan, Porto Rico, is a port or place in the United States within the meaning of the above enactment is determined by *Huus v. New York and Porto Rico Steam-*

ship Company, 182 U. S. 392, where it was held that a steam vessel engaged in trade between Porto Rico and New York was not engaged in foreign trade but was "a coastwise seagoing steam vessel" within the meaning of section 4401, Revised Statutes. Referring to section 9 of the Porto Rico organic act (31 Stat. 79) which provides that "the coasting trade between Porto Rico and the United States shall be regulated in accordance with the provisions of law applicable to such trade between any two great coasting districts of the United States," the court said (182 U. S. 396):

"* * * By this act it was evidently intended, not only to nationalize all Porto Rican vessels as vessels of the United States, and to admit them to the benefits of their coasting trade, but to place Porto Rico substantially upon the coast of the United States, and vessels engaged in trade between that island and the continent, as engaged in the coasting trade. This was the view taken by the executive officers of the Government in issuing an enrollment and license to the *Ponce*, to be employed in carrying on the coasting trade, instead of treating her as a vessel engaged in foreign trade."

The question, therefore, resolves itself to this: Is it a violation of section 8 of the act of June 19, 1886, as amended, *supra*, for a foreign vessel to transport passengers from one port of the United States to another port thereof, via foreign ports, where part of the object of the voyage is to see these foreign ports, though the main object of the voyage is the transportation to the domestic port of destination?

Such transportation is clearly a violation both of the letter and spirit of the statute. It falls directly within its terms, and is in every respect coastwise transportation. In 18 Op. 445 it appeared that a foreign vessel carried passengers from Cleveland, Ohio, to Windsor, Canada, from whence they purchased tickets to Chicago and resumed their voyage on the same vessel, landing finally at Chicago. This was held to be a continuous voyage from Cleveland to Chicago, and a violation of section 8 of the act of June 19, 1886. That opinion is clearly controlling here.

The fact that the passengers stop at the intervening foreign ports, desiring in good faith to see these interesting places, can not affect the case. Their motives are not the proper subjects of inquiry. They are, in fact, transported from San Juan to their *ultimate destination*, New York, and landed there. The case of *The Cleveland* (28 Op. 204) is distinguishable. There the whole object of the voyage was to visit foreign places, and it was in no just sense a transportation from New York to San Francisco. In the case now submitted, however, it is evident from your statement that the voyage would not be undertaken at all if it were not desired to reach New York.

Respectfully,

GEORGE W. WICKERSHAM.

The SECRETARY OF COMMERCE AND LABOR.

CUSTOMHOUSE AT SAN FRANCISCO—PAYMENT FOR
EARTHQUAKE LOSSES BY CONTRACTOR.

The provision of the act of May 27, 1908 (35 Stat. 318), which authorizes the Secretary of the Treasury to reimburse the contractor for the loss sustained by him in consequence of the earthquake and fire of 1906 in constructing the customhouse at San Francisco, does not warrant any payment to his subcontractors for their individual losses due to these causes.

If, however, the contractor should, in pursuance of his verbal understanding with the subcontractors, pay them an amount properly attributable to said earthquake and fire, he would be entitled to be reimbursed for that amount out of the appropriation in question.

DEPARTMENT OF JUSTICE,

February 1, 1913.

SIR: I have the honor to respond to your letter of the 10th ultimo, wherein you request my opinion upon certain questions arising under the act of May 27, 1908 (35 Stat. 318). The questions and the supporting facts are thus stated by you:

"This act authorized the Secretary of the Treasury to pay Thomas Butler, the contractor for construction of the customhouse at San Francisco, such sum as may be equitable and just and without profit to him to reimburse him

for loss actually sustained in consequence of the earthquake and fire of 1906, not exceeding \$250,000, in the erection of said building.

"A committee was appointed by this Department to consider Mr. Butler's claims under the act, and from their report it appears that at the time the earthquake occurred no work had been done by the contractor except some excavation; that a number of his subcontractors abandoned their contracts on account of the earthquake having increased the cost of their work, but some of his subcontractors adhered to their contracts and performed their work at claimed expenditures aggregating \$114,549 in excess of their contract prices with Mr. Butler made before the earthquake.

"The committee has reported the loss upon the items of work under subcontracts at \$26,465.24, but that Mr. Butler in his claim showed that these items of work were performed under a verbal understanding with the subcontractors that they would only consider him in their debt if the Government would reimburse him for the losses he was facing and that he does not appear to have paid them any more than the subcontract price for said items. (Pp. 8, 9, 10, and 11 of the committee's report.)

"Hence, the question arises upon which your opinion is requested, whether the amount \$26,465.24 reported by the committee (or such amount as I may finally determine upon), as the loss on the items of work performed by the subcontractors under the above understanding with Mr. Butler, are losses sustained by Mr. Butler within the meaning of the act of 1908, *supra*, and may be paid to him; also if the opinion on the above be in the affirmative, whether the said subcontractors should be required to file their consent to payment to Mr. Butler of the amounts allowed on said items."

The portion of the act of 1908 requiring consideration reads as follows:

"San Francisco, California, customhouse: The Secretary of the Treasury is authorized upon the completion of the customhouse in the city of San Francisco, California, to pay to Thomas Butler, the contractor for the construction

48 *Payment for Earthquake Losses by Contractor.*

of said building, in addition to the contract price therefor, such sum as may be equitable and just to reimburse said contractor for any loss actually sustained in consequence of the earthquake and great fire of April, nineteen hundred and six, not exceeding the sum of two hundred and fifty thousand dollars: *Provided*, That the amount allowed said Thomas Butler shall not be sufficient to enable him to make any profit out of the making and execution of said contract."

This item appears to have been incorporated into the sundry civil bill by a Senate amendment, which was modified in conference (Cong. Rec. vol. 42, pp. 6228 and 6568), but neither the Senate committee report nor the debates on the bill throw any light upon its scope.

I find that in reporting upon this item to the chairman of the Committee on Public Buildings and Grounds of the Senate, prior to its inclusion in the sundry civil bill, you stated, under date of February 13, 1908:

"* * * * The Department is aware that the earthquake and conflagration following the same produced abnormal conditions in the building trades, resulting in a great increase in the cost of labor and materials in and about San Francisco, and the fulfillment of the contract of Mr. Butler has become more difficult and burdensome on that account.

"While the contractor has no legal claim for damages against the United States because of this increase in the cost of labor and materials, it is also true that he was not responsible in any way for those conditions and could not have foreseen or guarded against them, and that the entire burden and loss falls upon him. * * * the contractor has not yet made all his subcontracts, and does not know at this time what the completion of the contract will actually cost him."

The language employed by Congress in the appropriation act under consideration, together with the available facts, negatives the idea that in authorizing you to pay Mr. Butler, the contractor, such sum as may be equitable and just "for any loss actually sustained in consequence of the earthquake and great fire" of 1906, Congress intended to

confer upon you power to make allowance to subcontractors for their individual losses, due to these causes. To hold that you have such authority would require an interpolation in the statute of the words "or any subcontractor," or their equivalent. This could not be done without assuming legislative functions.

It is equally clear that the losses suffered by the subcontractors with whom Mr. Butler entered into agreements prior to the earthquake and fire, which losses, your committee states, Mr. Butler agreed to compensate them for, but only in the event he was reimbursed by the Government, can not properly be included in his claim, for he has not paid them, and therefore can not be said to have suffered in consequence thereof.

I am of opinion, however, that if Mr. Butler, now that Congress has provided for his reimbursement for the losses sustained by him, should, in pursuance of his verbal understanding with these subcontractors, pay them such amount as you may determine is properly attributable to the earthquake and great fire at San Francisco, he would be entitled to be reimbursed for that amount out of the appropriation in question, as the same would then be a loss actually sustained by him in consequence of the earthquake and fire.

Respectfully,

GEORGE W. WICKERSHAM.

THE SECRETARY OF THE TREASURY.

EIGHT-HOUR LAW—CONTRACTS FOR THE PURCHASE OF
LOCOMOTIVES.

Contracts for the purchase of locomotives made according to standard designs and assembled, as ordered, of parts kept in stock are excepted from the operation of the eight-hour law of June 19, 1912 (37 Stat. 137).

DEPARTMENT OF JUSTICE,

February 4, 1913.

SIR: I have the honor to acknowledge the receipt of your letter of the 27th ultimo, in which you request an opinion as to whether the act of June 19, 1912 (37 Stat. 137), regulating the hours of labor on Government work, is

applicable to contracts for a locomotive for the use of the Government Hospital for the Insane.

You inclose a letter from the H. K. Porter Co., of Pittsburgh, Pa., one of the prospective bidders, in which it is stated that the process of manufacture of the said locomotives is, not to make contracts with customers, and thereupon make the various parts of the locomotive, but to make a large quantity of duplicate parts for standard designs, keep them on hand in stock ready for use, and assemble the parts when the locomotive is ordered. The locomotive you propose to order is of such a standard design, as illustrated by a photograph accompanying the letter of the H. K. Porter Co., and is sold as of that particular design.

According to the well-settled rule of this Department, I can not undertake to pass upon questions of fact. Assuming that locomotives are, in general, sold according to standard designs, and are assembled, as ordered, of parts kept in stock, as stated in the letter of H. K. Potter Co., I am of the opinion that they do not fall within the provisions of section 1 of the act of June 19, 1912, but are excepted therefrom by the provisions of section 2 of said act, even when they are made of a peculiar design, to conform to particular specifications.

These locomotives do not appear to differ in this respect from automobiles, which are sold according to different designs, and which may or may not be actually set up in the shop at any particular moment. The same is true of many articles of furniture. The main point is that such articles are not *sui generis*, but are standard articles, offered in the same form to the public generally. They belong, therefore, to the class which it was the intent of Congress to except from the operation of the act of June 19, 1912.

The general principles governing the interpretation of this statute are stated in my opinion to the President, of January 21, 1913, relating to supplies for the Government Printing Office, a copy of which is inclosed herewith. It may be of assistance to you in resolving questions of the character here discussed.

Respectfully,

GEORGE W. WICKERSHAM.

The SECRETARY OF THE INTERIOR.

EMPLOYMENT OF RETIRED ARMY OFFICER AS SUPERINTENDENT OF INDIAN SCHOOL.

A retired Army officer, even though receiving upward of \$2,500 per annum, may be employed as superintendent of an Indian school or agency, where no additional compensation is allowed, without contravening the provision of the act of February 27, 1906 (34 Stat. 48), which prohibits the Government from accepting voluntary service.

The words "voluntary service," as employed in the above-mentioned act, were not intended to cover services rendered in an official capacity under regular appointment to an office otherwise permitted by law to be nonsalaried.

DEPARTMENT OF JUSTICE,

February 7, 1913.

SIR: I have the honor to reply to your letter of September 26, 1912, in which you ask my opinion on the following question:

"Whether a retired Army officer, receiving upwards of \$2,500 per annum, could be employed as superintendent of an Indian school or agency, without additional compensation, without contravening the provisions of the act of February 27, 1906 (34 Stat. 48)."

I am of opinion that the employment suggested would not contravene the provisions of the act referred to.

The act, so far as material, provides as follows:

"Sec. 3. That section thirty-six hundred and seventy-nine of the Revised Statutes of the United States, as amended by section four of the deficiency appropriation act approved March third, nineteen hundred and five, is hereby further amended to read as follows:

"Sec. 3679. No Executive Department or other Government establishment of the United States shall expend, in any one fiscal year, any sum in excess of appropriations made by Congress for that fiscal year, or involve the Government in any contract or other obligation for the future payment of money in excess of such appropriations unless such contract or obligation is authorized by law. *Nor shall any Department or any officer of the Government accept voluntary service for the Government or employ personal service in excess of that authorized by law, except in cases of sudden emergency involving the loss of*

human life or the destruction of property. * * * * *
(34 Stat. 27, 48, 49.) [Italics indicate clauses not originally contained in the section.]

It is possible that the clause "in excess of that authorized by law" is a limitation on the words "voluntary service" as well as on the words "personal service," and if so, the question you put would not require further discussion, because, of course, services as superintendent of Indian schools or agencies are authorized by law. (R. S. sec. 2071.) Such a construction would be sensible in view of the evident purpose of Congress to prevent the doing of things which it had not authorized to be done.

But however this may be, it seems plain that the words "voluntary service" were not intended to be synonymous with "gratuitous service" and were not intended to cover services rendered in an official capacity under regular appointment to an office otherwise permitted by law to be nonsalaried. In their ordinary and normal meaning these words refer to service intruded by a private person as a "volunteer" and not rendered pursuant to any prior contract or obligation, and they were exactly so construed (though not as a part of this statute) in *Board of Commissioners v. Richardson* (54 Ind. 153, 156). An incidental dictum of Mr. Justice Field in his separate concurring opinion in *United States v. San Jacinto Tin Co.* (125 U. S. 273, 305) may in some of its language be construed to indicate a view that Congress intended "voluntary service" to be synonymous with "gratuitous service," but his language was explicitly addressed to "the practice of obtaining services from *private parties* without incurring liabilities for them." It is perfectly evident to me, from examining the whole passage, that he had no intention of intimating that appointments to office without compensation would be unlawful. It would be stretching the language a good deal to extend it so far as to prohibit *official* services without compensation in those instances in which Congress has not required even a minimum salary for the office.

The context corroborates the view that the ordinary meaning of "voluntary services" was intended. The very

next words "or employ personal service in excess of that authorized by law" deal with *contractual* services, thus making a balance between "acceptance" of "voluntary service" (i. e., the cases where there is no prior contract) and "employment" of "personal service" (i. e., the cases where there is such prior contract, though unauthorized by law).

Taking the section as a whole, it is also perfectly evident from its legislative history that the purpose was to prevent the Departments from incurring financial obligations over and above those authorized in advance by Congress. In its original form it did not contain the words I have italicized in the text as quoted above, but merely prohibited—

(1) Any present expenditures in excess of appropriations.

(2) Any contract for future payments in excess of the appropriations.

Experience convinced Congress that these provisions did not suffice to accomplish the full result desired, because deficiencies continued to occur and claims for extra services or for unauthorized services continued to be presented in such a way as to put Congress under a moral compulsion to meet them. Accordingly, Congress added to Revised Statutes, section 3679, the words italicized above, which involved the prohibition of "obligations" as well as "contracts," and prohibited, in addition to the above matters (1) and, (2) theretofore specified by the section, the following further matters:

(3) Acceptance of voluntary service (i. e., service which, though not performed under the prohibited contract or obligation, still carried with it a quasi-contractual or moral right to compensation and—

(4) Employment of personal service in excess of that authorized by law (i. e., especially additional work imposed upon clerks outside regular hours).

That this was the purpose of the amendment was made plain by the following statement to the House by the chairman of the committee in charge of the bill:

"I call attention to this particular limitation because we seek by it to prevent deficiencies in the future. It is

a hard matter to deal with. We give to Departments what we think is ample, but they come back with a deficiency. Under the law they can [not] make these deficiencies, and Congress can refuse to allow them; but after they are made it is very hard to refuse to allow them; * * * we seek by this amendment to in some respect, at least, cure that abuse. * * *” (39 Cong. Rec., 58th Cong., 8d sess., pt. 4, p. 3687.)

The same purpose was shown also by the following similar statement made by the chairman of the House conferees on a former occasion, when a substantially identical clause was incorporated in the urgent deficiency act of May 1, 1884 (23 Stat. 15, 17):

“This provision was inserted by the House because, under a practice which has grown up, clerks in the Departments here and perhaps Government employees elsewhere, having been employed, as it may be said, after hours, have demanded additional compensation for service thus rendered. The House conferees hold that cases of this kind ought to have been reached by existing law as contained in the following provision of the legislative, executive, and judicial appropriation act approved March 3, 1883:

“‘That hereafter it shall be the duty of the heads of the several Executive Departments, in the interest of the public service, to require of all clerks and other employees, of whatever grade or class, in their respective Departments not less than seven hours of labor each day, except Sundays and days declared public holidays by law or executive order: *Provided*, That the heads of the Departments may by special order, stating the reason, further extend or limit the hours of service of any clerk or employee in their Departments respectively, but in case of an extension it shall be without additional compensation.’

“In the face of that provision claims have been presented for extra services performed here and elsewhere by employees of the Government who had been engaged after hours. Some of these claims arose in connection with the life-saving stations. The House conferees, adopting what they believed to be a fair construction of the law, held that a clerk or other employee of the Government should

be controlled in the same manner as individuals in the employ of a private person or corporation, and when the necessity arises for additional service, or for working outside of regular hours, should render such service without additional pay. Upon this point arose the difficulty. The Senate proposed to strike out the provision adopted by the House. The conferees have reached a compromise by allowing the House provision to stand with the addition of the words 'except in cases of sudden emergency involving the loss of human life or the destruction of property.'

"It was urged that there had been, and might again be, occasions when the life-saving organization of the Government might require the service of persons not regularly provided for by law; and for this reason the clause I have just quoted was added.

"I believe the Secretary of the Treasury in recently assigning clerks to duty in connection with the rebate of the tobacco tax has adopted the construction of the law for which we contended, and which we claim is justified by the terms of the act. When the Secretary of the Treasury or any other officer of the Government has occasion to demand from any clerk or other employee service outside of the usual regulations, the rendering of such service should not, under a proper construction of the law, involve any claim whatever for additional pay." (15 Cong. Rec., 48th Cong., 1st sess., pt. 4, pp. 3410, 3411.)

Thus it is evident that the evil at which Congress was aiming was not appointment or employment for authorized services without compensation, but the acceptance of unauthorized services not intended or agreed to be gratuitous and therefore likely to afford a basis for a future claim upon Congress. The latter class of case has been held to be within the act. (*Lee v. United States*, 45 Ct. Cl. 57.)

Having regard, therefore, to the particular language used and to the purpose as disclosed also by the legislative history, I am of opinion that Revised Statutes, section 3679, does not prohibit the appointment of a person to an official position, even though it be a condition of the appointment that the service is to be without compensation.

Of course, I do not mean by anything I have said herein to intimate that persons may be appointed without compensation to any position to which Congress has by law attached compensation. (*Glavey v. United States*, 182 U. S. 595; *Miller v. United States*, 103 Fed. 413.) The position of superintendent of Indian schools, however, is one of those appropriated for in general lump sums (37 Stat. 518 *passim*; 35 Stat. 73; 34 Stat. 1020) and to which, therefore, persons may be appointed either without compensation or with any compensation short of the maximum.

Very respectfully,

GEORGE W. WICKERSHAM.

The SECRETARY OF THE INTERIOR.

WITHDRAWAL OF BIDS BEFORE ACCEPTANCE.

A bidder on a Government contract can not withdraw his bid before a reasonable time is allowed the Government for acceptance after the opening of the bids.

Where certain bids for the purchase of copper scrap located on the Isthmus of Panama were to be opened and tabulated at Washington and were then to be referred to the Isthmus for final decision: *Held*, That a delay of seven days before notice of acceptance was not unreasonable as a matter of law.

DEPARTMENT OF JUSTICE,
February 14, 1913.

SIR: I have the honor to acknowledge the receipt of your letter of the 29th ultimo, stating that the general purchasing officer, Isthmian Canal Commission, advertised in the accompanying circular (No. 747) for bids, to be opened January 11, 1913, for a certain number of pounds of copper-bearing scrap material; that the Great Western Smelting & Refining Co. was the highest bidder on certain items, and that on January 18 the bid of the Great Western Co. was accepted, but that, before said acceptance was made, but after the bids were opened, the said Great Western Co. had withdrawn its bid.

Under these circumstances you request my opinion upon the following questions:

"1. Whether in the absence of a stipulation as to the time within which the bid should be accepted the delay of seven days in this case was an unreasonable one so that the bid should be regarded as not remaining open for acceptance?

"2. Whether in the absence of a special agreement that the bid should remain open for any specified period the bidder had the right to withdraw the bid before notice of acceptance, without forfeiting the bond which was submitted with the bid?"

I assume that there is no statute governing the case such as section 3719, Revised Statutes, construed in 21 Op. 56, and relating to proposals for contracts with the Navy Department, as the acts of April 10, 1878 (20 Stat. 36), and March 3, 1883 (22 Stat. 487), relating to the similar subject in connection with the War Department and apparently before the Attorney General in the manuscript opinion to the Secretary of War of May 15, 1908 (see Dig. Judge Adv. Genl's Ops., ed. 1912, p. 336). There was also a statute applying to the matter in *Kimball v. Hewitt, Mayor*, 2 N. Y. Supp. 697, and in *Moffett v. City of Rochester*, 33 C. C. A. 319; s. c. 178 U. S. 373.

I likewise assume that there is no departmental regulation applicable to the case and having the force of law as may have been the case in *Scott v. United States*, 44 Ct. Cls. 524, 529.

The only thing, therefore, to take the present case out of the ordinary rule is the circular inviting bids, the proposal of the Great Western Co., and the terms of the guaranty bond.

The circular has the following stipulation:

"Each bid must be accompanied by a bond in good security in a form hereto attached, or by certified check on, or certificate of deposit in, a bank or trust company of the United States, acceptable to the commission, and made payable to the order of the disbursing officer thereof, in an amount equal to 15 per cent of the amount bid. Such check or certificate may be held, deposited, or collected by the disbursing officer, in his discretion. The same, or their

proceeds, will be returned to unsuccessful bidders on rejection of their bids, and to the successful bidder upon a formal execution of a contract with the commission in conformity with the terms of this invitation, accompanied by a bond in the penal sum of not less than 20 per cent of the amount of the award, with approved security for the faithful performance of such contract.

"Should the successful bidder fail to enter into such contract and furnish such bond within 30 days after receipt of notice of acceptance of his bid and award of contract by the commission, the check or certificate submitted with the bid, or the proceeds thereof, shall be forfeited, or the bond on his proposal shall become payable in the full amount thereof as liquidated damages for such failure."

The proposal concludes as follows:

"If any award should be made to the undersigned, the undersigned will, within thirty (30) days of acceptance of bid, enter into a contract in conformity with the terms and requirements of the aforesaid invitation and this proposal, with approved security, for the purchase of the material covered thereby."

The conditions of the bond are:

"The conditions of the above obligation are such that any award made by the Isthmian Canal Commission to the above-bounden principal, for the purchase of material under circular invitation No. 747, shall be accepted by said principal forthwith, and the said principal shall enter into a contract for the purchase of such material in conformity with said invitation, and the annexed proposal, and give bond in the penal sum of not less than twenty (20) per cent of the amount of the award with good and sufficient sureties, to be approved by the commission, for the faithful performance of said contract. And the undersigned bind themselves, their heirs, executors administrators, and successors to pay to the United States, in case the said principal shall fail to enter into such contract and furnish such bond within thirty (30) days after such award the aforesaid sum of money, as liquidated damages."

It was held by Attorney General Black in 9 Op. 174, and by Solicitor General Phillips, with the approval of

Attorney General Devens, in 15 Op. 648, that a bidder on Government contracts, like a bidder on ordinary contracts, could withdraw his bid at any time before acceptance. "His bid never was accepted, as it was not *in esse* when the acceptance purported to be made." (Ibid. 651.)

In 9 Op. 174, there was a departmental regulation on the subject, of which Attorney General Black said:

"Here there was a rule of the Department, that bids put in should not be withdrawn after a certain time, whether accepted or not. It is necessary that such a rule should exist, and Congress ought to enact it. But you have no power, in the present state of the law, to enforce it. As long as it remains a mere regulation its utmost effect will be given to it by allowing it to enter into and become part of the offer. The proposal, then, would be read as if the bidder had appended to it a promise not to withdraw it before the Department should decide upon it. Such a promise would create a moral obligation, but all the books say that it is *nudum pactum*, and not binding in law."

In the case before Solicitor General Phillips there was an act of Congress providing that the contract should be let to the lowest responsible bidder "accompanied by such securities as the Secretary of War shall require." (15 Op. 650.)

In 21 Op. 56, Acting Attorney General Whitney advised that the bidder, under the circumstances, be held to his proposal. After referring to section 3718, Revised Statutes, which awards the contract to the lowest bidder, fulfilling the other requirements of the law, and intimating that this puts Government contracts in a different category from contracts of private individuals as regards proposal and acceptance, he states that "the rulings of this Department, however, *in the absence of any special statutory provision*, are that the bidder may withdraw at any moment until notice of acceptance of his bid." (Citing the two opinions noticed above.)

He then considers section 3719, Revised Statutes, providing that "each proposal shall be accompanied by a written guaranty * * * that the bidder, if his bid is accepted, will * * * give bond with good and sufficient sureties

to furnish the supplies proposed," and that if the bidder, after acceptance of his proposal and notification thereof, fail to give the additional bond, the loss shall be charged against himself and his guarantor, and says:

"* * * Strictly construed, this does not prevent a withdrawal before acceptance. Liberally construed, in conformity with the manifest intent of the provision, I think it may fairly be held that it binds the bidder to stand by his bid, at least after the hour of opening. The case being doubtful, I am inclined to give a liberal construction to the statute, since in this way only can its authoritative construction be obtained from the courts. I would therefore advise that Mr. Neville be held to his proposal, and that no right of withdrawal on his part be recognized, but that he and his guarantors be held responsible."

In 22 Op. 45, 47, all three of the opinions just noted are referred to with apparent approval by Attorney General Griggs, it being held that a bidder might modify his bid by telegraph previous to the opening of the bids, and that the modified bid "would, upon acceptance *before withdrawal*, bind the bidder."

In the manuscript opinion to the Secretary of War of May 15, 1908, *supra*, the files of the War Department show that the bidding in question was made under the provisions of the act of April 10, 1878, as amended by the act of March 3, 1883 (Comp. Stat. 1901, p. 2497), which is, in every material respect, similar to section 3719, Revised Statutes, construed in 21 Op. 56, *supra*. The guaranty bond furnished by the bidder bound the obligor in case the bidder should fail to enter into a formal contract within 10 days after notice of acceptance. Nevertheless, it was held that a bidder who withdrew his bid before acceptance, was not bound, nor was his guarantor. As to the bidder it was said: "Clearly, the shipbuilding company, *in the absence of special agreement*, had the right to withdraw its offer at any time prior to acceptance." Construing the condition of the bond, it was said: "This language plainly imports that there shall have been an acceptance of the offer." The statute applying to the subject is not noticed, nor is Mr. Whitney's opinion cited.

In *Moffett v. City of Rochester*, 91 Fed. 28, 31, the case involved the right to reform a bid for mistake, but one of the material considerations was the provision of the city charter to the effect that "neither the principal nor sureties on any bid or bond shall have the right to withdraw or cancel the same until the board shall have let the contract for which such bid is made and the same shall have been duly executed." Of this the Court of Appeals for the Second Circuit said:

"* * * The statute, *as well as the notice to bidders*, informed all bidders that a proposal once submitted could not be withdrawn. *A proposal made under such circumstances is entitled to be regarded as having some attributes of finality which do not belong to ordinary contracts.*"

The Supreme Court reversed the decision below on the ground that the mistake vitiated the bid so that the appellant had no proposal at all before the board and hence the provisions of the city charter did not apply (178 U. S. 373, 385, 386). The court said:

"The rule between individuals is that until a proposal be accepted it may be withdrawn, and if this principle can not be applied in the pending case, on account of the charter of the city, there is certainly nothing in the charter which forbids or excuses the existence of the necessary elements of a contract.

"The charter of the city provides that 'neither the principal nor sureties on any bid or bond shall have the right to withdraw or cancel the same until the board shall have let the contract for which such bid is made, and the same shall be duly executed.' A perfectly proper provision, but as was said by the learned circuit court:

"The complainant is not endeavoring 'to withdraw or cancel a bid or bond. * * *'"

In *Scott v. United States*, 44 Ct. Cls. 524, certain regulations of the Commissioner of Indian Affairs, approved by the Secretary of the Interior, were relied on, providing that bidders should deposit with their bids a certified check which should be forfeited "in case any bidder or bidders receiving an award shall fail to promptly execute the lease for grazing purposes." While it might be claimed that

this regulation was equivalent to a statutory provision on the subject, it does not appear that the court, in holding that the deposit was forfeited, where the bidder withdrew his bid before acceptance, regarded the regulation as anything more than a notification to bidders. The *ratio decidendi* may be gathered from the following quotations:

"The agents of the Government stand upon a different footing from private individuals in the matter of advertising for the letting of contracts in behalf of the United States. They have no discretion. They must accept the lowest or the highest responsible bid, or reject all and re-advertise. Private individuals are not required thus to act. Hence it is apparent that Government agents should be allowed a reasonable time after the opening of bids before they are allowed to be withdrawn, so they can be afforded opportunities to ascertain whether collusion or fraud had been perpetrated against the United States by the parties engaged in the bidding. It is also apparent that if the rule of allowing immediate withdrawals after the results of the bidding are made known, frauds innumerable could be perpetrated against the United States, and thus public justice would be greatly hampered. Experience in advertising for proposals for contracts has rendered it necessary for the different Departments of the Government to require a deposit of 5 to 10 per cent of the approximate amount involved as an evidence of good faith and honest dealing on the part of the bidders, said deposit to be forfeited if the rules of the Departments are not complied with; otherwise such deposits will be returned to the bidders. It is an easy matter for a bidder to shun responsibility if he has underestimated or overestimated in his proposal, provided he is allowed to withdraw his bid and with it recover the amount of his deposit."

* * * *

"One of the purposes of this regulation is to prevent the withdrawal of bids when the results of the biddings are made known and before it is possible under Government rules and regulations to accept or reject a bid. It is evident from the language used in this regulation that its main

purpose is to protect the Government from conspiracies which might occur among bidders for Government contracts, and in no sense was it intended to punish them. Hence the necessity, as we have already stated, that in cases of this character, agents of the Government should be allowed a reasonable time in which to pass upon proposals before they can be withdrawn by the parties who made them."

In my judgment, the fair construction of the circular inviting bids in the present case is that the Isthmian Canal Commission will impartially consider, and pass upon such bids, and such bids only, as contain a stipulation that the proposal shall remain open for a reasonable time for acceptance by the commission, and shall be accompanied by a bond securing such stipulation, and the fair construction of the proposal, and of the conditions of the bond, is that the Great Western Co. and its bondsman agreed to the stipulations of the circular so construed. This construction of the circular, and of the proposal and bond, accords with the evident purpose of the whole transaction, and with the common understanding of business men. That being the case, it is my opinion that there was a sufficient consideration to support an obligation upon the part of the Great Western Co. and its bondsman to keep its bid open for a reasonable time. It may be admitted that the Great Western Co. had no right that the contract should be awarded to it, even if it were the highest bidder (*Talbot Paving Company v. Detroit*, 109 Mich. 657; *Molloy v. New Rochelle*, 123 N. Y. App. Div. 642; *Colorado Paving Company v. Murphy*, 78 Fed. 28; *United States ex rel. Goldberg v. Meyer*, 37 App. D. C. 282); yet it did have the right that its bid should be considered and considered on its merits (*Faist v. Hoboken*, 72 N. J. L. 361), and this right was only conceded it on the condition that it would agree not to withdraw its bid until the commission had had a reasonable time to tabulate the bids, consider the responsibility of the bidders, etc.

This seems, therefore, to be a case of mutual stipulations, the commission agreeing to receive and consider all

bids submitted only if the bidders would agree not to withdraw them capriciously, and give security to that effect, while the bidders made this concession because of their understanding that the commission would treat their bids with the fair and impartial consideration incumbent on public officers.

Even if there were more doubt as to the correctness of this conclusion than I am inclined to allow, it is my judgment that this doubt should be resolved in favor of the Government for the reasons of public policy so well set forth in the opinion of the Court of Claims. Where no mistake, unreasonable delay, or the like exists, no injustice is done the bidder by holding him to the conditions of the advertisement on which he bid, while to give bidders the right of withdrawal, *in all cases*, would work a grave injustice to the Government.

One further consideration I think it proper to notice. The circular inviting bids required, and the Great Western Co. gave, a preliminary guaranty bond. It is well settled, indeed it is elementary, that a bond being a specialty derives its validity from its mere delivery. Consideration, and therefore the binding force of mutual promises, have no application to such an instrument. It is of the same character as, and is alternated in many statutes with, a deposit in cash or a certified check. (Sec. 3719, R. S. as amended. Comp. Stat. 1901, p. 2499.) There can hardly be any doubt that a bidder who withdrew his bid before acceptance would forfeit a deposit of cash, no matter what view should be taken of the question of his contractual relations to the Government. (Dillon on Municipal Corporations, ed. 1911, sec. 810; *Robinson v. Board of Education*, 98 Ill. App. 100.) Possession having been transferred, the fact that the bidder never became legally bound would be immaterial. I can see no difference in the case of a bond given in lieu of, and as a representative of, cash. The obligor must perform its conditions according to their proper construction, irrespective of whether there is a consideration for his principal's promise or not, and as, in my opinion, the condition in the bond in this case bound the

obligor if an award was made within a reasonable time, without fraud or mistake, whether the bidder had withdrawn his bid or not, this obligation must be complied with, whatever view may be taken of the main question.

Your second question inquires whether there was an unreasonable delay in waiting until the 18th of January to accept bids opened in Washington on January 11.

The advertisement inviting proposals, and the proposals themselves, showed that the copper scrap which was to be sold was located on the Isthmus of Panama, and that, while the bids were to be opened at the office of the general purchasing officer at Washington, the contract was to be awarded by the Isthmian Canal Commission.

It further appears from the papers submitted that while the price of copper fell from 17.15 cents on January 11, when the bids were opened, to 16½ cents on January 18, when the award was made, most of this fall had occurred by January 15.

I am limited, by statute, in rendering opinions to "questions of law." In view of the fact that the bids after being opened and tabulated had to be referred to the Isthmus for final decision, both as to the question of the highest bidder, and as to the responsibility of such bidder, and that if the award had been made on the 15th day of January, the loss to the Great Western Co. would have been approximately as great as on the 18th, when the award was actually made, it is my opinion that the delay of seven days was not unreasonable *as a matter of law*. This opinion, however, does not relieve the administrative officers from determining whether, on all the circumstances, including those submitted to me as well as any others in their knowledge, there has been such a delay *in fact* as to make it inequitable to hold the Great Western Co. to its proposal.

Respectfully,

GEORGE W. WICKERSHAM.

THE SECRETARY OF WAR.

DUPLICATE CHECKS—INDEMNITY BONDS.

In case of the loss of an original check issued by a United States disbursing officer, the Secretary of the Treasury has no authority, under the provisions of section 3646 of the Revised Statutes, to dispense with the giving of a bond as a condition to the issuance of a duplicate check.

DEPARTMENT OF JUSTICE,

February 15, 1913.

SIR: Under date of January 30, 1913, you ask my opinion as to your authority to dispense with a bond under the provisions of section 3646 of the Revised Statutes. Your request is evidently suggested by the following facts disclosed by the papers and correspondence submitted:

In April, 1912, the O. J. Gude Co., of New York, rendered an account, amounting to \$3,653.35, against the United States for advertising work done in connection with the recruiting service of the United States Army.

On May 25, 1912, a check, No. 917806, for said amount, payable to the order of the Gude Co., was signed by Lieut. Col. M. G. Zalinski, Deputy Quartermaster General of the Army, and mailed to the payee. The latter states that the check was never received. Payment was therefore stopped. Evidently the check left the possession of the War Department and was thereafter lost.

On November 23, 1912, more than six months subsequent to such loss, the Gude Co. applied to Col. Zalinski for a duplicate check and was advised that such duplicate would be issued upon the execution of a bond in double the sum represented by the lost check. The Gude Co. asks that the duplicate check be issued without giving a bond, and you ask whether you have authority to grant that request.

By section 3620 of the Revised Statutes it is made the duty of every disbursing officer having public money intrusted to him for disbursement to deposit the same with the treasurer or assistant treasurer, and to draw for same only as it is required for payments to be made in pursuance of law, and only in favor of the persons to whom payment is to be made; in places where there is no treasurer or assistant treasurer, the Secretary of the Treasury may specially

authorize the deposit of public money to be made in any other depository.

By regulation of December 7, 1906, of the Secretary of the Treasury it is provided that any check of a disbursing officer upon money so deposited must be in favor of the party by name to whom the money is to be paid, except, among others, in case of payments in amounts not exceeding \$20.

The issuance, by authority of law, of duplicate checks was originally limited by the act of March 19, 1868 (15 Stat. 43), to such checks as had been issued in payment of *bounties*. Section 3 of that act provided that the assistant treasurers of the United States in the cities of New York and San Francisco should—

“ * * * pay duplicate checks, for bounties granted under the said act, upon notice and proof of the loss of the original check or checks, under such regulations as the Secretary of the Treasury may direct.”

The statute governing the present question is section 3646, R. S., as reenacted and amended by the act of February 23, 1909 (35 Stat. 643), which is as follows:

“ Whenever any original disbursing officer's check is lost, stolen, or destroyed, the Secretary of the Treasury may authorize the officer issuing the same, after the expiration of six months and within three years from the date of such disbursing officer's check, to issue a duplicate thereof upon the execution of such bond to indemnify the United States as the Secretary of the Treasury may prescribe * * *.”

The act of February 23, 1909, passed the House January 22, 1909, and the Senate February 15, 1909, without debate. Neither House report No. 1855 nor Senate report No. 960, Sixtieth Congress, second session, throw light upon the intent of Congress, other than that indicated in the plain language of the law itself.

Looking back, however, at the debates in Congress about the time of the passage of the act of February 2, 1872 (17 Stat. 29), which in the revision became section 3646, we find the following statements made by Senator Sherman, speaking in behalf of the Committee on Finance in the Senate (Cong. Globe, 42d Cong., 2d sess., p. 521):

" * * * I will inform the Senator [Trumbull] that under the present law checks of disbursing officers of a certain character (for pension claims and bounty claims) are now provided for in this way; and after a practice of three years under that law there has been found to be no difficulty in supplying duplicates of such checks. The law requires all payments of disbursing officers to be made by checks on a depository. The result is that the number of checks has been increased enormously in the practice of the Government, and cases have arisen of great hardship, where the evidence is perfectly clear that the check has been lost or destroyed; and still there is no power to grant relief except in special cases.

"Under the practice as to the issuing of duplicate checks in pension and bounty cases, no single loss to the Treasury has ever occurred; and this extension of the law is recommended by the officers of the Government, and very strongly urged, on account of very severe cases that have arisen of the destruction or loss of checks and drafts. As a matter of course, before a duplicate is issued a bond has to be given, with proper security, under such regulations as may be prescribed by the Secretary of the Treasury.

"There are with the files which I have sent with the bill to the Secretary's desk the forms that have been adopted. They are very stringent. There is also a strong letter of the Second Comptroller urging the necessity of the bill, one from Gen. Spinner, one from the Paymaster General, and one from the Secretary of the Treasury, all concurring that it is indispensably necessary in order to supply relief in certain cases.

"The Committee on Finance hesitated a good while because it is an important question. We examined it carefully. It was also examined by the Committee on Ways and Means of the House. We concluded that it was safe under the restrictions of the bill to pass it * * *."

In the debates in Congress at the time of the passage of the act of March 19, 1868, *supra*, Senator Corbett, of Oregon, sought (Cong. Globe, 40th Cong., 2d sess., pt. 2, p. 1788) to amend the law so as to include any lost check, but

the amendment was rejected and the act passed in the language stated above.

In discussing the purposes of the law to provide for the issuance of duplicate checks, Senator Corbett said, on March 10, 1868, *supra*:

" * * * There are instances that I know of on the Pacific coast where checks have been lost and the money is standing to the credit of officers of the United States in San Francisco, and has been for two or three years, and they are unable to get the money out of the Treasury. I desire to amend that section so that it will apply to other checks at the end of two years, under such regulations as the Secretary of the Treasury may prescribe. He of course will require bonds, and that will be a perfect protection to the Treasury."

And Senator Sherman said, *supra*:

" It was to avoid that very abuse of this section that I made the motion to refer the bill to the Committee on Finance. The discovery now made by my friend from Oregon shows the importance of it. As a matter of course an authority to pay lost checks would be a very dangerous one unless it was very carefully limited. Under the regulations of the Treasury Department a lost check is never paid on a duplicate except upon bond given. But it would be idle to require a soldier who has merely lost one of his papers to give a bond. We have limited the operation of the section simply to claims for bounty; but in all other cases they must give bonds * * *."

From the earlier legislation it is apparent that Congress intended to authorize the issue of duplicate checks in payment of bounty without bond, but in the later legislation authorizing the issuance of duplicate checks in all other instances it was clearly intended that such other duplicate checks should be issued only upon the giving of a proper bond to protect the United States from loss.

Said section 3646 has been before the courts but once. In *Becker v. United States*, 26 Court of Claims, 172, it was held that this section was not the only remedy, but that the claimant whose check had been lost might sue in the Court of Claims. In awarding judgment, however, the court

directed that, if the judgment should be finally paid at the Treasury, a bond of indemnity should be taken.

The construction which I thus give to section 3646 is in accord with the practice of your Department. In the memorandum accompanying your letter it is stated that since the approval of the act of February 2, 1872, from which said section of the Revised Statutes was taken, the Department has approved 38,758 duplicate checks, and in each instance a bond has been required.

I am of the opinion that under the provisions of section 3646 you have no authority to dispense with the giving of a bond as a condition to the issuance of a duplicate check.

Respectfully,

GEORGE W. WICKERSHAM.

The SECRETARY OF THE TREASURY.

REASSIGNMENT OF QUARTERS IN STATE, WAR, AND NAVY
BUILDING.

The consent of Congress is essential to a reassignment of the quarters now occupied by the Departments in the State, War, and Navy Building.

DEPARTMENT OF JUSTICE,
February 17, 1913.

SIR: I have the honor to advise you upon the question submitted in a letter dated February 3, 1913, by your Economy and Efficiency Commission as to whether it would be necessary to obtain the consent of Congress to a reassignment of the quarters now occupied by the Departments in the State, War, and Navy Building.

In my opinion the consent of Congress would be necessary. The question is in substance the same as that decided in the opinion of Assistant Attorney General Harr, dated September 24, 1912, to the Secretary of the Interior, relative to the transfer to the Bureau of Mines of certain disused portions of the lighting and heating plant of the Library of Congress. In that opinion it was said (29 Op. 524, 525):

"There being no statute specifically prohibiting or authorizing such a transfer, the authority of the superin-

tendent of the Library Building and Grounds to make it must be entirely a matter of implication from the powers devolved upon him by law. The act of February 19, 1897 (29 Stat. 545), impliedly makes him the custodian of the property referred to, but that carries with it no authority to transfer such property to some other branch or establishment of the Government, even if its use for heating and lighting the Library has been discontinued. On the contrary, his duties as custodian impliedly prohibit him from transferring the possession of the property committed to his care to some one else.

“ * * * It is for Congress, under its constitutional grant with respect to the regulation and disposition of the territory and other property of the United States, to say what shall be done with the apparatus in question. Mere custodians under it have no such authority.”

The considerations upon which that opinion was based apply even more forcibly in the present case. The superintendent of the Library Building was *impliedly* custodian of the property in question. But Revised Statutes, sections 203, 217, and 418, in *express terms* make the Secretary of State, the Secretary of War, and the Secretary of the Navy the custodians of all property appertaining to their respective departments, and, as was held in that opinion, mere custodians have no right of transfer.

The circumstances under which the existing assignment of quarters was made leads irresistibly to the same conclusion. At the time the building was erected a considerable difficulty arose as to the space to be assigned to the respective Departments. The House of Representatives in the legislative, executive, and judicial appropriation bill for 1882 proposed to solve this delicate situation through a definite allotment of the rooms in the new building by the direct action of Congress itself. (13 Cong. Rec., p. 4872.)

The Senate, however, considered the matter of space distribution to be more properly for the discretion of the President and the respective Secretaries and struck out the apportioning clause of the bill. Senator Allison, in charge of the bill, explained the action of the Senate committee as follows (13 Cong. Rec. 5498) :

"Mr. ALLISON. As the bill came from the House there was an absolute direction as to how various apartments in what is known as the State, War, and Navy Department Building should be occupied. We did not think that was a wise thing for us to do. Therefore we so altered the section as to give the discretion to the President. That is all we mean by the amendments. The original section required a certain portion of this building to be occupied by the Secretary of War, not only what he occupies now, except two rooms, but all the new north wing, which will be completed about the 1st of December. There is a controversy with reference to the south wing, that portion now occupied by the State Department, and also with reference to a portion of the east wing, which the Navy Department occupies. We think it wise to allow these different Secretaries to state their suggestions to the President and let him decide between them. He has that power, undoubtedly, without any legislation. So I shall not be particularly mortified if the whole section goes out."

The House refused to concur in the amendment, and the matter went to conference. Both sides proved obdurate. A second, a third, and even a fourth conference was necessary before a compromise could be reached. (First disagreement, 13 Cong. Rec. 6098-6101; second disagreement, 13 Cong. Rec. 6388-6391, 6429-6431; third disagreement, 13 Cong. Rec. 6523, 6686; fourth conference report adopted, 13 Cong. Rec., pp. 6232, 6889.)

The debates show clearly that the principal difference between the two Houses was whether the assignment of space in the State, War, and Navy Building should be expressly prescribed by Congress itself or should be left to the discretion of the respective Secretaries and the President. The following dialogue between Senator Allison, reporting for the second conference committee, and Senator Sherman, who sympathized with the attitude of the House of Representatives, summarizes the whole debate (13th Cong. Rec. 6388):

"Mr. ALLISON. We are unable to agree upon section 6 of the bill, which is legislation relating to the transfer of the records of the Surgeon General's Office to the Adjutant

General's Office, and also relating to the distribution and the occupancy of the building known as the State, War, and Navy Building. We have agreed upon everything else.

"Mr. SHERMAN. Would it help the matter if the Senate should recede from the last amendment? I believe the House is right in regard to the distribution of rooms in that building. Would that help the matter toward an agreement if we should recede?

"Mr. ALLISON. It would very much, so far as the House is concerned.

"Mr. SHERMAN. Would the House then agree to the other amendments?

"Mr. ALLISON. No, sir; they would not.

"Mr. SHERMAN. What does the Senator advise?

"Mr. ALLISON. My advice is another conference. I will say briefly that while I have no doubt there ought to be some reorganization of the clerical force in that large building, known as the State, War, and Navy Building, yet it seems to me that that ought to be left in some way to the Departments now in the occupation of that building and should not be fixed by law. Especially is that so in view of the fact that the north wing of the building is not yet completed. It seems to me that a permanent readjustment of the clerical force in that building can not well be made until the north wing is completed, which will not be before November. The Senate conferees believe that we should leave at least for the present this readjustment to the several secretaries having charge of the building, and if by next winter they are not willing to make a proper economical adjustment of the clerical force in that building, then I shall be ready for one to take hold of the matter and fix it by legislation; but it seems to me it is premature to undertake to do so at this time.

"Mr. SHERMAN. * * * That matter ought to be arranged; and I do not believe that the President can do it, because he will not like to undertake to decide a controversy between the Secretary of State and the Secretary of the Navy. The Secretary of State will never surrender his part of the building because it is part of the dignity of his

department to have all that great wing. The Secretary of the Navy may insist upon having part of it, but he can not prevail unless the Secretary of State will yield, and they will never agree. Therefore, I think the law ought to determine exactly how much room shall be allotted, giving to the State Department and giving to the Navy Department ample room and verge enough, I think to the former a little more than any other department in proportion to its size; but I think the great body of that wing ought to be assigned to an active department of the Government."

See also the speech of Mr. Cannon, reporting to the House of Representatives the disagreement of the third conference committee (13th Cong. Rec., p. 6429), and also the statement by the same gentleman in reporting to the House the result of the fourth and final conference (13th Cong. Rec. 6889).

The final outcome was the creation of a joint select committee of three members of the House of Representatives and three Senators (13th Cong. Rec. 6889). It was further provided that this committee should—

"* * * make examination of said building and set apart such portions thereof for the use and occupancy of the State, War, and Navy Departments, respectively, as in their judgment the best interests of the public service and the needs of said Departments, respectively, may require; and upon filing an agreed statement of such partition by said joint select committee in triplicate with the respective secretaries of such Departments the building shall be occupied as therein provided as soon thereafter as practicable." (22 Stat. 219, 256.)

I am, therefore, of the opinion that Congress has deliberately taken from the executive branch of the Government any discretion in the assignment of space as between the three departments in the State, War, and Navy Building, and that any reassignment would require additional legislation.

Very respectfully,

WINFRED T. DENISON,
Acting Attorney General.

The PRESIDENT.

ELIGIBILITY OF RETIRED OFFICERS OF THE REVENUE-CUTTER SERVICE TO CIVIL OFFICES.

A retired officer of the Revenue-Cutter Service does not come within the purview of the Executive order of January 17, 1873, which prohibits a person while holding a Federal civil office from accepting or holding a State, Territorial, or municipal office.

DEPARTMENT OF JUSTICE,
February 17, 1913.

SIR: I have the honor to acknowledge the receipt of your letter of the 25th ultimo, in which you request an opinion whether the Revenue-Cutter Service is to be considered as a civil or as a military service.

The accompanying papers show that the question arises in connection with the case of First Lieut. of Engineers H. O. Slayton, United States Revenue-Cutter Service, retired, who desires to become a candidate for the office of councilman for his ward at Port Townsend, Wash., and the only objection to his so doing suggested to me is based upon the President's order of January 17, 1873.

That order in full is as follows:

"Whereas it has been brought to the notice of the President of the United States that many persons holding civil office by appointment from him, or otherwise, under the Constitution and laws of the United States, while holding such Federal positions, accept offices under the authority of the States and Territories in which they reside, or of municipal corporations, under the charters and ordinances of such corporations, thereby assuming the duties of the State, Territorial, or municipal office at the same time that they are charged with the duties of the civil office held under Federal authority: and

"Whereas it is believed that, with but few exceptions, the holding of two such offices by the same person is incompatible with a due and faithful discharge of the duties of either office; that it frequently gives rise to great inconvenience, and often results in detriment to the public service; and, moreover, is not in harmony with the genius of the Government:

"In view of the premises, therefore, the President has deemed it proper thus and hereby to give public notice that, from and after the 4th day of March, A. D. 1873 (except as herein specified), persons holding any Federal civil office by appointment under the Constitution and laws of the United States will be expected, while holding such office, not to accept or hold any office under any State or Territorial government, or under the charter or ordinances of any municipal corporation; and, further, that the acceptance or continued holding of any such State, Territorial, or municipal office, whether elective or by appointment, by any person holding civil office, as aforesaid, under the Government of the United States, other than judicial offices under the Constitution of the United States, will be deemed a vacation of the Federal office held by such person, and will be taken to be, and will be treated as, a resignation by such Federal officer of his commission or appointment in the service of the United States.

"The offices of justices of the peace, of notaries public, and of commissioners to take the acknowledgment of deeds, of bail, or to administer oaths, shall not be deemed within the purview of this order, and are excepted from its operation, and may be held by Federal officers.

"The appointment of deputy marshal of the United States may be conferred upon sheriffs or deputy sheriffs. And deputy postmasters, the emoluments of whose office do not exceed six hundred dollars per annum, are also excepted from the operations of this order, and may accept and hold appointments under State, Territorial, or municipal authority, provided the same be found not to interfere with the discharge of their duties as postmaster. Heads of Departments and other officers of the Government who have the appointment of subordinate officers are required to take notice of this order, and to see to the enforcement of its provisions and terms within the sphere of their respective Departments or offices, and as relates to the several persons holding appointments under them respectively."

In my judgment, it is not necessary, in order to determine your question, to decide the exact status, whether civil or military, of the Revenue-Cutter Service. It has been

held to be a civil service by Attorney General Devens (15 Op. 396; 16 *ibid.* 288) and by the Comptroller of the Treasury (8 Comp. Dec. 852; 15 *ibid.* 807), but the legislation of Congress with respect thereto, particularly that of more recent years, while not changing its primary functions, which appear to be those of an armed police force, enforcing the municipal laws of the United States upon the navigable waters thereof, has certainly gone far to characterize it as a military force. Thus it may be ordered by the President to cooperate with the Navy (sec. 2757, Rev. Stat.); the officers thereof may be retired, as was Lieut. Slayton (act of Mar. 2, 1895, sec. 1, 28 Stat. 920; act of Apr. 12, 1902, sec. 4, 32 Stat. 100); its officers have assimilated rank with the officers of the Army and Navy (act of Apr. 12, 1902, sec. 2), with the same pay and allowances as officers of the Army (*ibid.* sec. 3), and they are promoted in the order of seniority, subject to special examinations (*ibid.* sec. 8); its enlisted force is enlisted for a term not to exceed three years (act of May 26, 1906, sec. 1, 34 Stat. 200); its officers and men are subject to military as well as civil punishment (*ibid.* secs. 2, 3, 4, 5, 6, and 7), and they may be buried in national cemeteries under the regulations for the burial of officers and men of the Army (act of Mar. 4, 1911, sec. 1, 36 Stat. 1389).

The military character given the Revenue-Cutter Service by this legislation was referred to in my opinion to the Secretary of War of December 28, 1910 (28 Op. 543, 547), where, however, it was pointed out that "it is still an organization separate and distinct from the Navy, under the control of the Secretary of the Treasury and assigned to duty in connection with the collection of the customs revenue," and that "now, as formerly, it can only be regarded as part of the Navy when serving therewith in accordance with law." It was accordingly held, in that opinion, that commissioned and warrant officers and seamen, in time of peace, were not entitled, under section 4878, Revised Statutes, to interment in national cemeteries, that privilege being limited by that section to "soldiers, sailors, or marines," the history of section 4878 showing that it had reference to persons in the Army, Navy, and Marine Corps. Since that

opinion, however, the act of March 4, 1911, above cited, was passed, allowing deceased officers and men of the Revenue-Cutter Service to be so interred, Congress thus emphasizing its purpose to treat that service as a military force.

However, as indicated above, I do not think it necessary to determine the exact status of the Revenue-Cutter Service in order to answer your question. In my judgment, a careful reading of the Executive order of January 17, 1873, proves that it was not intended to apply to *retired* officers, whether civil or not. The evil at which the order was aimed was the interference with public duties necessarily entailed in actively discharging the functions of two offices, and not any theoretical incompatibility in serving two masters. This is shown in the exemption of deputy postmasters whose emoluments do not exceed \$600 per annum, provided the holding of the two offices "be found not to interfere with the discharge of their duties as postmaster." This qualification is repeated in the supplementary order of January 28, 1873, dealing with the acceptance of office on boards of education, etc., and membership in local or municipal fire departments.

Therefore, in my opinion, a *retired* officer of the Revenue-Cutter Service does not come within the order of January 17, 1873, even if he be regarded as a civil officer. I have not overlooked the fact that retired officers may still be regarded as in the service of the United States and liable to be called to active duty (*United States v. Tyler*, 105 U. S. 244; 29 Op. 397; *ibid.* 503), but until so called they have no active duties to perform, and do not, while performing no active duties, come within the spirit of the order of January 17, 1873. An additional reason for this conclusion is that at the date of the order of January 17, 1873, there was no such thing known to the laws of the United States as a retired civil officer, and therefore there is no reason to suppose that the order was meant to cover such a class, so entirely different in its nature from the active civil officers which the order evidently had in mind.

Respectfully,

GEORGE W. WICKERSHAM.

THE SECRETARY OF THE TREASURY.

**CIVIL SERVICE—EMPLOYEES IN THE QUARTERMASTER'S
DEPARTMENT IN THE PHILIPPINES.**

The Civil Service Commission has no authority to cancel the classification of an employee brought within the classified civil service under the Executive order of March 1, 1904, which classified certain positions in the civil service of the War Department in the Philippines.

A person in the classified civil service can not be deprived of his status in the service except by removal as provided in section 6 of the act of August 24, 1912 (37 Stat. 555), and it is for the head of a Department, and not the Civil Service Commission, to determine when there exists proper cause for the removal.

DEPARTMENT OF JUSTICE,
February 24, 1913.

SIR: I have the honor to acknowledge the receipt of your letter of the 20th instant requesting my opinion upon certain questions based upon facts which you state as follows:

Under date of March 1, 1904, the President promulgated the following Executive order:

"All positions in the civil service of the War Department in the Philippines, except those filled by persons employed merely as skilled or unskilled laborers, and by persons appointed by the President, will be treated as classified under the civil-service rules. The present occupants of these positions who have been specially commended for retention by their chiefs, with the approval of the Secretary of War, and whose names appear on the list furnished the United States Civil Service Commission, may be retained, and after three years' service in such positions shall be eligible for transfer to competitive positions in the United States, subject to the civil-service rules and regulations."

Among the employees who were reported to the Civil Service Commission at various times as being entitled to the benefits conferred by this order was Richard Allen, who was reported by the Department to the commission under date of November 15, 1909, and the commission replied, under date of December 18, 1909, that in view of the fact that Allen was serving on March 1, 1904, in the Quartermaster's Department in the Philippines it was the opinion of the commission that he was eligible for classification

under the Executive order quoted, and that notation to that effect had been made on the files of the commission's office. Four months later, under date of April 26, 1910, the commission stated, in a letter to the Department, that an examination taken by Allen in the Philippines in July, 1904, had been fraudulent, and that in the commission's opinion his record was not such as to warrant his special commendation for retention under the terms of the Executive order in question, and submitted the matter "for the department's further consideration and recommendation." To this letter the Department replied, under date of August 17, 1910, after obtaining reports from the Philippine Islands, and recommended that the classification of Mr. Allen be allowed to stand, for reasons furnished. Since that time several communications have been exchanged between the Civil Service Commission and the Department, in which the matter has been discussed at length, and in the last letter received from the commission, dated February 15, 1913, the commission states that it "has withdrawn its consent to Mr. Allen's classification and he has no classified status."

* * * * *

The Department submits that the commission has not the power to cancel Mr. Allen's classification, for the reason that all of the provisions of the President's order have been met in his case, viz, that he was an occupant of one of the positions affected by that order at the time of its promulgation; that he was specially commended for retention by his chief with the approval of the Secretary of War; and that his name was placed on the list referred to in that order. As stated above, the Civil Service Commission recognized, in its letter to the Department of December 18, 1909, that the President's order operated to classify Mr. Allen.

Your questions are as follows:

(1) Whether it is within the jurisdiction of the Civil Service Commission to cancel the classification conferred by the President's order of March 1, 1904, and whether the Department may not legally retain Mr. Allen in its service

in his present status of a classified employee. His present position is that of clerk at \$1,440 per annum in the Quartermaster Corps of the Army, stationed at San Francisco, to which place he was transferred from the Philippines on November 15, 1912.

(2) Whether the cancellation of Mr. Allen's classification (which would mean his removal from the "classified civil service") could be effected except by compliance with section 6 of the act of Congress approved August 24, 1912, making appropriations for the Post Office Department, which provides—

"That no person in the classified civil service of the United States shall be removed therefrom except for such cause as will promote the efficiency of said service and for reasons given in writing, and the person whose removal is sought shall have notice of the same and of any charges preferred against him, and be furnished with a copy thereof, and also be allowed a reasonable time for personally answering the same in writing; * * *

and whether it does not lie with the War Department, and not with the Civil Service Commission, to determine whether there exists "such cause as will promote the efficiency" of the classified civil service.

The Executive order of March 1, 1904, is set out in the Twenty-first Report of the Civil Service Commission (p. 80) with the following comment:

"The reasons for the promulgation of this order are set forth in the commission's letter to the President of February 29, 1904:

"At the beginning of the military occupation of the Philippines the services of civilians were required in connection with the operations of the military establishments there. In view of the fact that the necessity of the services would not permit of delay in filling positions under the civil-service rules, the practice grew up of filling positions in the manner common among business men, by making selection from the most available persons in the immediate vicinity. The great majority of the appointments were to mere laborer or mechanical and trades positions, but there were a few technical positions and

some clerks and messengers. When conditions became more settled it was decided that appointments should be made under the civil-service rules, and, that no injustice might be done, it was considered that such employees as had rendered meritorious service should be retained. The Secretary of War has furnished a list of 426 persons who are recommended for retention, their status to be the same as other employees who have been included in the classified service without examination.' ”

As it appears that the Civil Service Commission has construed the order in question to apply to persons whose names may be added to the original list of eligibles from time to time, I shall assume that Mr. Allen's right to classification thereunder was not affected by reason of the fact that his name was not added to such list until November, 1909.

The first sentence of the Executive order classified the *positions* referred to. The second sentence specified the conditions under which the then occupants of such positions might be retained, and thereby brought within the classified civil service.

You say that Mr. Allen was an occupant of one of the positions affected by the order; that he was specially commended for retention by his chief, with the approval of the Secretary of War; and that his name was placed on the list referred to in the order. This was a literal compliance with the express provisions of the order, and Mr. Allen thereby acquired a classified status in the executive civil service. There is nothing in the order to suggest that the classification was to be subject to the approval of the Civil Service Commission. The War Department, not the commission, was authorized to determine who should be retained and become classified, and the classifications became effective without any action on the part of the commission.

Of course it was proper for the Civil Service Commission, when it learned of circumstances tending to discredit Mr. Allen's record, to bring the matter to the attention of the War Department in order that his case might be reconsidered. But the Department, after investigating the

charges referred to, came to the conclusion that there was nothing to warrant a withdrawal of its special commendation of Mr. Allen for classification. The commission had no authority to set aside this conclusion and deny to Mr. Allen classification under the Executive order. The classification was automatic upon the performance of the expressed conditions.

Having acquired a classified status under the President's order, Mr. Allen can be deprived thereof against his will only by removal from office in accordance with section 6 of the act of August 24, 1912 (37 Stat. 555), which provides:

"SEC. 6. That no person in the classified civil service of the United States shall be removed therefrom except for such cause as will promote the efficiency of said service and for reasons given in writing, and the person whose removal is sought shall have notice of the same and of any charges preferred against him, and be furnished with a copy thereof, and also be allowed a reasonable time for personally answering the same in writing, and affidavits in support thereof; but no examination of witnesses nor any trial or hearing shall be required, except in the discretion of the officer making the removal; and copies of charges, notice of hearing, answer, reasons for removal, and of the order of removal shall be made a part of the records of the proper department or office, as shall also the reasons for reduction in rank or compensation; and copies of the same shall be furnished to the person affected upon request, and the Civil Service Commission also shall, upon request, be furnished copies of the same; * * *."

It is for the head of a Department, and not the Civil Service Commission, to determine when there exists proper cause for the removal of a classified civil-service employee in his Department. The power of both appointment and removal of such employees is vested in the heads of Departments (21 Op. 356). The provisions of the above section 6 clearly negative any idea that it was intended the Civil Service Commission should determine for the Departments when an employee should be removed. It will be noted, for example, that "no examination of witnesses nor any trial or hearing shall be required except in the discretion of the

officer making the removal," also that the record relating to a removal is required to be kept in the "proper department or office," and "the Civil Service Commission also shall, upon request, be furnished copies of the same."

This disposes of your several questions without answering them categorically.

The correspondence between your Department and the Civil Service Commission, which indicates the views of the commission, has been carefully considered.

Respectfully,

GEORGE W. WICKERSHAM.

The SECRETARY OF WAR.

APPARATUS FOR RADIO COMMUNICATION ON STEAM VESSELS.

Article XI of the Service Regulations annexed to the international radiotelegraphic convention, which was ratified by the United States Senate on January 22, 1913, does not effect a modification of the terms of section 1 of the amendatory act of July 23, 1912 (37 Stat. 199), relating to the requirement of apparatus for radio communication on steam vessels.

DEPARTMENT OF JUSTICE,

February 24, 1913.

SIR: I have the honor to acknowledge the receipt of your letter of January 31, 1913, in which you invite attention to certain language found in section 1 of the amendatory act of July 23, 1912 (37 Stat. 199), relating to the requirement of apparatus for radio communication on steam vessels, and that pertaining to the same subject matter embraced in Article XI of the Service Regulations affixed to the international radiotelegraphic convention, signed at London July 5, 1912, and ratified by the United States Senate on January 22, 1913. You request my opinion as to whether the words in Article XI, to which reference is made, are to be deemed self-executing, and whether they modify the provision of the act to which attention is directed. In this connection it is to be noted that by Article 11 of the international convention the Service Regulations affixed thereto have the same force as the convention.

Article XI of the Service Regulations affixed to the convention provides:

"Ships provided with radio installations and classed under the first two categories indicated in Article XIII are bound to have radio installations for distress calls, all the elements of which shall be kept under conditions of the greatest possible safety to be determined by the Government issuing the license. Such emergency installations shall have their own source of energy, be capable of quickly being set into operation, of functioning for at least *six hours, and have a minimum range of 80 nautical miles for ships of the first category and 50 miles for those of the second.* Such emergency installations shall not be required in the case of vessels the regular installations of which fulfill the requirements of the present article."

In paragraph 1 of section 1 of the act of July 23, 1912, amending the act of June 24, 1910 (36 Stat. 629), among other things, it is provided:

"SECTION 1. That from and after October first, nineteen hundred and twelve, it shall be unlawful for any steamer of the United States or of any foreign country navigating the ocean or the Great Lakes and licensed to carry, or carrying, fifty or more persons, including passengers or crew or both, to leave or attempt to leave any port of the United States unless such steamer shall be equipped with an efficient apparatus for radio communication, in good working order, capable of transmitting and receiving messages over a distance of at least one hundred miles, day or night. An auxiliary power supply, independent of the vessel's main electric power plant, must be provided which will enable the sending set for at least *four hours to send messages over a distance of at least one hundred miles, day or night,* and efficient communication between the operator in the radio room and the bridge shall be maintained at all times."

Although the act was approved July 23, 1912, by section 2 it is provided that the act, so far as it relates to the Great Lakes, shall take effect on and after April 1, 1913, and, so far as it relates to ocean cargo steamers, that it shall take effect on and after July 1, 1913. Manifestly, there-

fore, unless modified by Article XI of the Service Regulations, in the absence of any further action on the part of Congress with respect thereto in the meantime, the provisions of the act to which reference is made, will become effective at the time thus specified.

Both in Article XI of the Service Regulations and in section 1 of the act as above set forth, the passages which are the subject of your inquiry are indicated by the words which I have underscored, and with respect to which there is a plain conflict.

It is a well-recognized rule that the provisions of a treaty and those of a statute are of equal dignity, and the principle that a treaty may be modified or repealed by a statute of a later date and vice versa is authoritatively established. But, unless a treaty is self-executing, it will not necessarily repeal a prior and inconsistent statute on the same subject. The stipulations of a treaty are to be construed fairly, and the intention of the parties thereto is to be ascertained from the instrument as a whole by the application of the same rules of construction as obtain with respect to private contracts and statutes. (*In re Ross*, 140 U. S. 453.) When the terms of a treaty import a contract on the part of the United States to do something, it is said that the treaty addresses itself to the political department, and in that event Congress must enact the necessary legislation to make it operative. The doctrine was recognized in *Foster v. Neilson* (2 Pet. 253, 314), wherein Chief Justice Marshall said:

“A treaty is, in its nature, a contract between two nations, not a legislative act. It does not generally effect, of itself, the object to be accomplished, especially so far as its operation is infra-territorial; but is carried into execution by the sovereign power of the respective parties to the instrument.

“In the United States, a different principle is established. Our Constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a

contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract, before it can become a rule for the court."

The foregoing principle has since been on various occasions reaffirmed: *Taylor v. Morton* (2 Curt. 454); *Whitney v. Robertson* (124 U. S. 190); *Butler Treaty-Making Power of the United States* (vol. 2, p. 66).

Article 1 of the London convention provides that:

"The high contracting parties bind themselves to apply the provisions of the present convention to all radio stations (both coastal stations and stations on shipboard) which are established or worked by the contracting parties and open to public service between the coast and vessels at sea.

"They further bind themselves to make the observance of these provisions obligatory upon private enterprises authorized either to establish or work coastal stations for radiotelegraphy open to public service between the coast and vessels at sea, or to establish or work radio stations, whether open to general public service or not, on board of vessels flying their flag."

And it is further provided by the convention:

"ARTICLE 19.

"The high contracting parties bind themselves to take, or propose to their respective legislatures, the necessary measures for insuring the execution of the present convention.

"ARTICLE 20.

"The high contracting parties shall communicate to one another any laws already framed, or which may be framed, in their respective countries relative to the object of the present convention."

It is to be further noted that by virtue of the last sentence of Article XI of the Service Regulations affixed to the international convention emergency installations are not required in the case of vessels the regular installations of which fulfill the requirements of that article, whereas the act in question, notwithstanding its provisions apply to steamers "of any foreign country," contains no similar

provision, but, on the contrary, the language of section 1 clearly excludes such an interpretation.

It is apparent that in order to make effectual the requirements contained in Article XI of the Service Regulations affixed to the convention legislation looking to the due enforcement thereof is indispensable. The significance of Articles I and XIX of the convention is, moreover, unmistakable. These considerations when tested by the principle stated in *Foster v. Neilson* lead to the conclusion that Article XI of the Service Regulations was not designed to be self-executing, and, obviously, its character in this particular is not altered by reason of the fact that there was in existence at the time of the ratification of the convention by the Senate a statute relating to the subject, the terms of which, however, are in conflict with that article.

It follows therefore that, unaided by an appropriate enactment of Congress, the article in question does not effect a modification of the terms of section 1 of the act of July 23, 1912, to which you refer.

Respectfully,

GEORGE W. WICKERSHAM.

The SECRETARY OF COMMERCE AND LABOR.

CONSTITUTIONALITY OF PROPOSED LEGISLATION DIVESTING INTOXICATING LIQUORS OF THEIR INTERSTATE CHARACTER IN CERTAIN CASES.

The bill entitled "An act divesting intoxicating liquors of their interstate character in certain cases" (S. 4043, 62d Cong., 3d sess; 37 Stat. 699), is repugnant to the Constitution of the United States, since it delegates to the States the power to regulate interstate commerce.

DEPARTMENT OF JUSTICE,

February 28, 1913.

SIR: I have examined with as much care as the very limited time at my disposal would permit the bill S. 4043, entitled "An act divesting intoxicating liquors of their interstate character in certain cases," which was passed by both Houses of Congress and presented to you on February

17th inst. This bill consists of but one section, which is as follows:

"Be it enacted, etc., That the shipment or transportation, in any manner or by any means whatsoever, of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind, from one State, Territory, or District of the United States, or place non-contiguous to but subject to the jurisdiction thereof, into any other State, Territory, or District of the United States, or place non-contiguous to but subject to the jurisdiction thereof, or from any foreign country into any State, Territory, or District of the United States, or place non-contiguous to but subject to the jurisdiction thereof, which said spirituous, vinous, malted, fermented, or other intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State, Territory, or District of the United States, or place non-contiguous to but subject to the jurisdiction thereof, is hereby prohibited.

Senator Kenyon, the sponsor of the bill during debate, said "that honest lawyers, frank with themselves, must concede that the questions involved are exceedingly troublesome; but inasmuch as the Supreme Court has expressly left open the question, it would seem that this was a proper case to place the matter squarely before them in order that a question of great importance might be determined." Whether or not the doubts concerning the constitutionality of this measure, thus frankly expressed, are so well founded as to require you to disapprove it, or are of a character which in view of the meritorious purpose of the legislation you should disregard, leaving them, as Senator Kenyon suggests, to be dealt with by the courts, is, I take it, the matter for your immediate consideration and determination.

In the Senate, Senators Root and Sutherland, among others, expressed in careful and forceful reasoning their conviction that the act was wholly beyond the constitutional powers of Congress, in which view Representative Brantley and other lawyers of high standing in the House of Representatives concurred.

Traffic in liquor has been the subject of much discussion both in Congress and before the courts of the United States ever since the decision in *Leisy v. Hardin* (135 U. S. 100), which held that a statute of a State prohibiting the sale of any intoxicating liquors, except for pharmaceutical, medicinal, chemical, or sacramental purposes, and under a license from a county court of the State was, as applied to a sale by the importer into the State, and in the original packages or kegs, unbroken and unopened, of such liquors, manufactured in and brought from another State, unconstitutional and void, as repugnant to the clause of the Constitution granting to Congress the power to regulate commerce with foreign nations and among the several States.

This case was decided April 28, 1890, and on August 8, following, Congress passed an act known as the Wilson Act (26 Stat. 313, c. 728), providing—

“that all fermented, distilled, or other intoxicating liquors or liquids transported into any State or Territory, or remaining therein for use, consumption, sale, or storage therein, shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise.”

That act was sustained in the case of *In re Rahrer* (140 U. S. 545) as a valid exercise of the power of Congress to regulate commerce among the States.

In delivering the opinion of the court, Fuller, C. J., said:

“The Constitution does not provide that interstate commerce shall be free, but, by the grant of this exclusive power to regulate it, it was left free except as Congress might impose restraint. Therefore, it has been determined that the failure of Congress to exercise this exclusive power in any case is an expression of its will that the

subject shall be free from restrictions or impositions upon it by the several States.

* * * *

“Unquestionably, fermented, distilled or other intoxicating liquors or liquids are subjects of commercial intercourse, exchange, barter, and traffic, between nation and nation, and between State and State, like any other commodity in which a right of traffic exists, and are so recognized by the usages of the commercial world, the laws of Congress and the decisions of courts. Nevertheless, it has been often held that State legislation which prohibits the manufacture of spirituous, malt, vinous, fermented or other intoxicating liquors within the limits of a State, to be there sold or bartered for general use as a beverage, does not necessarily infringe any right, privilege or immunity secured by the Constitution of the United States or by the amendments thereto.”

He referred to the language of Mr. Justice Catron in the *License cases* (5 How. 504, 599) to the effect that if from its nature an article did not belong to commerce, “or if its condition, from putrescence, or other cause, is such when it is about to enter the State that it no longer belongs to commerce, or, in other words, is not a commercial article, then the State power may exclude its introduction. * * *

That is to say, that which does not belong to commerce is within the jurisdiction of the police power of the State; and that which does belong to commerce is within the jurisdiction of the United States.”

Coming to consider whether or not, as declared by Congress, imported liquors shall upon arrival in a State fall within the category of domestic articles of a similar nature, the Chief Justice continued as follows:

“By the first clause of section 10 of Article I of the Constitution, certain powers are enumerated which the States are forbidden to exercise in any event; and by clauses two and three, certain others, which may be exercised with the consent of Congress. As to those in the first class, Congress can not relieve from the positive restriction imposed. As to those in the second, their exercise may be authorized; and they include the collection of the revenue from imposts

and duties on imports and exports, by State enactments, subject to the revision and control of Congress; and a tonnage duty, to the exaction of which only the consent of Congress is required. Beyond this, Congress is not empowered to enable the State to go in this direction. Nor can Congress transfer legislative powers to a State nor sanction a State law in violation of the Constitution; and if it can adopt a State law as its own, it must be one that it would be competent for it to enact itself, and not a law passed in the exercise of the police power. (*Cooley v. Port Wardens of Philadelphia*, 12 How. 299; *Gunn v. Barry*, 15 Wall. 610, 623; *United States v. Dewitt*, 9 Wall. 41.)”

But, he held, Congress can in the exercise of the discretion reposed in it conclude that the common interests do not require entire freedom in the traffic of ardent spirits, and so concluding, it had enacted the Wilson law.

“In so doing, Congress has not attempted to delegate the power to regulate commerce, or to exercise any power reserved to the States, or to grant a power not possessed by the States, or to adopt State laws. It has taken its own course and made its own regulation, applying to these subjects of interstate commerce one common rule, whose uniformity is not affected by variations in State laws in dealing with such property.”

The Chief Justice added that he perceived no reason why, if Congress chose to provide that certain designated subjects of interstate commerce shall be governed by a rule which divests them of that character at an earlier period of time than would otherwise be the case, it was not within its competency so to do; and accordingly held that the act of 1890 which withdrew the control of Congress over the articles in question upon their arrival within the State into which they were shipped was a constitutional exercise of power.

In *Rhodes v. Iowa* (170 U. S. 412) the court was called upon to construe the meaning of the words “upon such arrival in such State or Territory,” in the Wilson Act, it being contended that these words meant *on arrival at the State line*. But this interpretation was rejected, and it was held that, properly construed, the words meant to

withdraw the Federal control when the goods had arrived at the point of destination and were delivered there to the consignee. "Undoubtedly," the court said: "the purpose of the act was to enable the laws of the several States to control the character of merchandise therein enumerated at an earlier date than would have been otherwise the case, but it is equally unquestionable that the act of Congress manifests no purpose to confer upon the States the power to give their statutes an extraterritorial operation so as to subject persons and property beyond their borders to the restraints of their laws. If the act of Congress be construed as reaching the contract for interstate shipment made in another State, the necessary effect must be to give to the laws of the several States extraterritorial operation, for, as held in the *Bowman case*,¹ the inevitable consequence of allowing a State law to forbid interstate shipments of merchandise would be to destroy the right to contract beyond the limits of the State for such shipments. If the construction claimed be upheld, it would be in the power of each State to compel every interstate commerce train to stop before crossing its borders, and discharge its freight, lest by crossing the line it might carry within the State merchandise of the character named covered by the inhibitions of a State statute."

* * * *

"Whilst it is true that the right to sell free from State interference interstate commerce merchandise was held in *Leisy v. Hardin* to be an essential incident to interstate commerce, it was yet but an incident, as the contract of sale within a State in its nature was usually subject to the control of the legislative authority of the State. On the other hand, the right to contract for the transportation of merchandise from one State into or across another involved interstate commerce in its fundamental aspect, and imported in its very essence a relation which necessarily must be governed by laws apart from the laws of the several States, since it embraced a contract which must come under the laws of more than one State. The purpose of Congress to submit the incidental power to sell

¹ *Bowman v. Chicago & C. R. R. Co.*, 125 U. S. 465.

to the dominion of State authority should not without the clearest implication be held to imply the purpose of subjecting to State laws a contract which in its very object and nature was not susceptible of such regulation even if the constitutional right to do so existed, as to which no opinion is expressed."

The court quoted from the opinion in the *Bowman case* a passage which pointed out the confusion which would arise if the laws of the several States were allowed to have an extraterritorial operation, saying that uniformity in the regulations by which a carrier is to be governed from one end of his route to the other is a necessity in his business, and that to secure it Congress, which is untrammelled by State lines, has been invested with the exclusive legislative power of determining what such regulation shall be; and added:

"And it was doubtless this construction which caused the court to observe in the opinion *In re Rahrer*, 140 U. S. 545, 552, that the act of Congress 'divests them (objects of interstate commerce shipment) of that character at an earlier period of time than would otherwise be the case.' We think that in interpreting the statute by the light of all its provisions, it was not intended to and did not cause the power of the State to attach to an interstate commerce shipment, whilst the merchandise was in transit under such shipment, and until its arrival at the point of destination and delivery there to the consignee, *and of course this conclusion renders it entirely unnecessary to consider whether if the act of Congress had submitted the right to make interstate commerce shipments to State control it would be repugnant to the Constitution.*"

The bill presented for your consideration now squarely presents the question put in the clause above underlined, for the bill, avowedly and clearly, proposes to submit the right to make interstate-commerce shipments in spirituous, vinous, malt, fermented, or other intoxicating liquor of any kind to State control. Senator Root said during the discussion over it:

"What is proposed in this bill is that the Government of the United States shall hand over to the government

of each State the right to say how and when and under what conditions interstate commerce in these articles of commerce, so treated and regarded by all the States shall be had." (Cong. Rec., vol. 49, p. 2931.)

Yet in *Vance v. W. A. Vandercreek Co.* (170 U. S. 438-444), the court, in passing on the constitutionality of the South Carolina dispensary act, said that the proposition was well established:

"that the right to send liquors from one State into another, and the act of sending the same, is interstate commerce, the regulation whereof has been committed by the Constitution of the United States to Congress, and, hence, that a State law which denies such a right, or substantially interferes with or hampers the same, *is in conflict with the Constitution of the United States.*"

In discussing the constitutionality of that provision in the act of 1890 which withdrew the protection of Congress from the incidental right of the importer into a State of spirituous or vinous liquors to sell the same in the original package, the court advanced as a conclusive answer to one of the contentions made against its constitutionality, "that the interstate commerce clause of the Constitution guarantees the right to ship merchandise from one State into another, and protects it until the termination of the shipment by delivery at the place of consignment, and this right is wholly unaffected by the act of Congress which allows State authority to attach to the original package, *before sale* but only *after delivery.*"

"It follows," said Mr. Justice White in delivering the opinion of the court, "that under the Constitution of the United States every resident of South Carolina is free to receive for his own use liquor from other States, and that the inhibitions of a State statute do not operate to prevent liquors from other States from being shipped into such State, on the order of a resident for his use. * * * To hold the law unconstitutional because it prevents such sale in the original package would be to decide that the State law was unconstitutional because it exerted a power which the State had a lawful right to exercise. Indeed, the law of the State here under review does not purport to for-

bid the shipment into the State from other States of intoxicating liquors for the use of a resident, and if it did so, it would, upon principle and under the ruling in *Scott v. Donald*, to that extent be in conflict with the Constitution of the United States.

"It is argued that the foregoing considerations are inapplicable since the State law, now before us, whilst it recognizes the right of residents of other States to ship liquor into South Carolina for the use of residents therein, attaches to the exercise of that right such restrictions as virtually destroy it.

"But the right of persons in one State to ship liquor into another State to a resident for his own use *is derived from the Constitution of the United States*, and does not rest on the grant of the State law. Either the conditions attached by the State law unlawfully restrain the right, or they do not; if they do—and we shall hereafter examine this contention—then they are void. If they do not, then there is no lawful ground of complaint on the subject."

Again, analyzing the effect of the State statute which in substance prohibited the importation of liquor for one's own use, without first obtaining a certificate from a State official, the court said:

"The right of the citizen of another State to avail himself of interstate commerce can not be held to be subject to the issuing of a certificate by an officer of the State of South Carolina, without admitting the power of that officer to control the exercise of the right. *But the right arises from the Constitution of the United States; it exists wholly independent of the will of either the lawmaking or the executive power of the State; it takes its origin outside of the State of South Carolina, and finds its support in the Constitution of the United States.* Whether or not it may be exercised depends solely upon the will of the person making the shipment, and can not be in advance controlled or limited by the action of the State in any department of its government."

These foregoing decisions were applied in the case of *American Express Company v. Iowa* (196 U. S. 147), where it was held that a package of intoxicating liquor

received by a company in one State to be carried to a purchaser in another State, C. O. D., is interstate commerce, and is under the protection of the commerce clause of the Constitution, and may not be confiscated under the prohibitive liquor laws of the State.

In *Pabst Brewing Company v. Crenshaw* (198 U. S. 27) it was held that a State statute which operates upon beer and malt liquors shipped from other States *after their arrival and while held for sale and consumption within the State*, was not an interference with interstate commerce in view of the provisions of the Wilson Act of 1890. The purpose of that act, said Mr. Justice White—

“was to make liquor after its arrival a domestic product and to confer power upon the States to deal with it accordingly. The police power is hence to be measured by the right of a State to control or regulate domestic products, a State and not a Federal question as respects the commerce clause of the Constitution.

* * * * *

“To decide that an exertion by a State of its power to regulate the sale of malt liquors manufactured within the State was an exercise of its police authority, and yet to say that the same, when applied to liquor shipped into the State from other States after delivery, was not an exertion of the police power, would be to destroy the Wilson Act, and frustrate the very object which it was intended to accomplish, and besides would overrule the previous decisions of this court upholding and enforcing that statute.”

In *Heyman v. Southern Railway Co.* (203 U. S. 270) it was held that the word “*arrival*” as used in the Wilson act means delivery of the goods to the consignee, and not merely reaching their destination; and that the power of the State over intoxicating liquors from other States in original packages after delivery and before sale, given by the Wilson law, does not attach before notice and expiration of a reasonable time for the consignee to receive the goods from the carrier; and that this rule is not affected by the fact that under the State law the carrier’s liability

as such may have ceased and become that of a warehouseman.

"As the general principle is that goods moving in interstate commerce cease to be such commerce only after delivery and sale in the original package, and as the settled rule is that the Wilson law was not an abdication of the power of Congress to regulate interstate commerce, since that law simply affects an incident of such commerce by allowing the State power to attach after delivery and before sale, we are not concerned," said Mr. Justice White, "with whether under the law of any particular State, the liability of a railroad company as carrier ceases and becomes that of a warehouseman on the goods reaching their ultimate destination, before notice and before the expiration of a reasonable time for the consignee to receive the goods from the carrier. For, whatever may be the divergent legal rules in the several States concerning the precise time when the liability of a carrier as such in respect to the carriage of goods ends, they can not affect the general principle as to when an interstate shipment ceases to be under the protection of the commerce clause of the Constitution, and thereby comes under the control of the State authority."

In *Delamater v. South Dakota* (205 U. S. 93) it was held that since the enactment of the Wilson law the owner of intoxicating liquor in one State can not, under the commerce clause of the Constitution, go himself or send his agent into another State, and, in defiance of its laws, carry on the business of soliciting proposals for the purchase of such liquors; that although a State may not forbid a resident thereof from ordering for his own use intoxicating liquor from another State, it may forbid the carrying on *within its borders* of the business of soliciting orders for such liquor, although such orders may only contemplate a contract resulting from final acceptance in another State. Mr. Justice White said:

"It is settled by a line of decisions of this court, noted in the margin, that the purpose of the Wilson Act, as a regulation by Congress of interstate commerce, was to allow the States, as to intoxicating liquors, when the subject of

such commerce, to exert ampler power than could have been exercised before the enactment of the statute. In other words, that Congress, sedulous to prevent its exclusive right to regulate commerce from interfering with the power of the States over intoxicating liquor, by the Wilson Act adopted a special rule enabling the States to extend their authority as to such liquor shipped from other States before it became commingled with the mass of other property in the State by a sale in the original package."

Sections 238, 239, and 240 of the Penal Code forbid under penalty (1) delivery of intoxicating liquor to any person other than the consignee, unless upon his written order, or to any fictitious person; (2) the collection of the purchase price of intoxicating liquor by any common carrier, or the acting of such as agent of buyer or seller; (3) the shipment of any liquor unless labeled on the outside to show name of consignee, nature of contents, and quantity contained.

Senator Sutherland said of this legislation that it gives the State "full power to seize and confiscate liquor after it reaches the hands of the consignee, and the sections of the Penal Code, by requiring delivery to an actual consignee and the plain marking of every package with the name of consignee and the quantity and kind of liquor contained, furnishes information which will enable the State to act." (Cong. Rec., vol. 49, 2919.)

The bill under consideration goes beyond all this. It proposes to make unlawful the transportation of liquor from one State to another where it "is intended by any person interested therein to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of" the law of the State, etc., into which it is shipped. If, therefore, the law of any State shall prohibit absolutely the possession or use of liquor within that State, then under this bill the mere introduction of liquor across the boundary line of the State would be conclusive evidence of an intention to violate that law and would subject the carrier and all persons having any interest in the liquor to penalties imposed by the State law.

On the other hand, in those States where the use of liquor is permitted to any degree under restrictions, the carrier and all persons having any interest in the liquor would, from the moment of its introduction into the State, be liable to the penalties imposed by the State law if the evidence should warrant the inference that anyone of them intended to use the liquor so taken into the State in any manner which should violate the State law. This of course would operate to give to the statutes of the State an extraterritorial operation so as to subject persons and property without the State to the restraint of these laws, by preventing them from making contracts of sale and delivery which would be lawful in the State where made, but which could not be enforced by delivery within the State of the purchaser if such delivery were prohibited by the laws of such State. If, as was said in *Rhodes v. Iowa* (*supra*):

“The right to contract for the transportation of merchandise from one State into or across another involved interstate commerce in its fundamental aspect and imparted in its very essence a relation which necessarily must be governed by laws apart from the laws of the several States, since it embraced a contract which must come under the laws of more than one State,”

this fundamental right which, as shown in the above cases is protected by the Constitution, and subjected only to the exclusive power of regulation vested in Congress would be entirely destroyed by this legislation. This was the principal ground upon which Senator Root based his objection to the bill.

“In the second place,” he said, “the provision undertakes to invalidate the contracts of the people of each State by reason of the intention of some one else in regard to future conduct under the laws of other States. The laws of a given State require a common carrier to accept and carry an invoice of goods. The contract is obligatory. The contract is made. But under this provision, if it is effective at all, the contract is invalidated because some one besides the carrier, and it may be some one besides the shipper, has an undisclosed intention to violate, after the

transaction of transportation is over, an unknown law in a different State." (Cong. Rec. vol. 49, p. 2930.)

"What is proposed in this bill" he added, "is that the Government of the United States shall hand over to the government of each State the right to say how and when and under what conditions interstate commerce in these articles of commerce, so treated and regarded by all the States shall be had." (Cong. Rec. 49, p. 2931.) Mr. Root referred to another objection, namely "that this bill does not merely hand over to the State which is the terminus ad quem of this transportation, the power to regulate interstate commerce within its borders, but it undertakes by Federal law to enforce in each State the laws of other States. * * * Let us say that the State of Iowa, which has stringent laws, is empowered by this statute, if it is passed, to declare the circumstances under which beer may be imported from the city of St. Louis in the State of Missouri. If the beer is carried in in accordance with the laws of the State of Iowa, it is a good transaction. If it is carried in in violation of those laws, with intent to sell without a license, with intent to sell in a 'dry' town, rather than a 'wet' town, with intent to sell for one purpose rather than another, then it is a bad transaction and the contract made in Missouri is a void contract, made void by the law of Iowa." (Cong. Rec., vol. 49, p. 2931.)

It was said in the *Bowman* case (125 U. S. 465, 480) that—

* * * "the rule has been asserted with great clearness that whenever the subjects over which a power to regulate commerce is asserted are in their nature national, or admit of one uniform system or plan of regulation, they may justly be said to be of such a nature as to require exclusive legislation by Congress. * * * Surely transportation of passengers or merchandise through a State, or from one State to another, is of this nature. It is of national importance that over that subject there should be but one regulating power, for if one State can directly tax persons or property passing through it, or tax them indirectly by levying a tax upon their transportation, every other may, and thus commercial intercourse between States remote

from each other may be destroyed. * * * It was to guard against the possibility of such commercial embarrassments, no doubt, that the power of regulating commerce among the States was conferred upon the Federal Government."

The court quoted from the case of *Cooley v. Port Wardens* (12 How. 299) the following language:

"The subjects, indeed, upon which Congress can act under this power" (over interstate commerce) "are of infinite variety, requiring for their successful management different plans or modes of treatment. Some of them are national in their character, and admit and require uniformity of regulation, affecting alike all the States; others are local, or are mere aids to commerce, and can only be properly regulated by provisions adapted to their special circumstances and localities. Of the former class may be mentioned all that portion of commerce with foreign countries or between the States which consist in the transportation, purchase, sale, and exchange of commodities. Here there can of necessity be only one system or plan of regulations, and that Congress alone can prescribe. * * * And it is a matter of public history that the object of vesting in Congress the power to regulate commerce with foreign nations and among the States was to insure uniformity of regulation against conflicting and discriminating State legislation."

Again—

"Commerce with foreign countries and among the States, strictly considered, consists in intercourse and traffic, including in these terms navigation and the transportation and transit of persons and property, as well as the purchase, sale, and exchange of commodities. For the regulation of commerce as thus defined, there can be only one system of rules, applicable alike to the whole country; and the authority which can act for the whole country can alone adopt such a system. Action upon it by separate States is not, therefore, permissible." (Citing 12 How. 702.)

In summing up a review of the authorities on the subject of the limits of State legislation which would en-

trench upon commerce among the States, Mr. Justice Matthews said:

"In a word it may be said that in the matter of interstate commerce the United States are but one country and are and must be subject to one system of regulations and not to a multitude of systems."

This doctrine was asserted with emphasis in *Leisy v. Hardin* (135 U. S. 100, 119). It is also declared in *Mobile v. Kimball* (102 U. S. 691, 697); *Hall v. Dequar* (95 U. S. 485, 507).

But it is contended that the bill would in the exercise of the undoubted powers of Congress merely declare spirituous, vinous, malted, fermented or other intoxicating liquors of any kind to be in effect "outlaws of commerce," and subject that class of merchandise to the exercise of the police powers of the several States.

"Doubtless," said the court in the *Bowman case*, "the States have power to provide by law suitable measures to prevent the introduction into the States of articles of trade, which, on account of their existing condition, would bring in and spread disease, pestilence, and death, such as rags or other substances infected with the germs of yellow fever or the virus of smallpox, or cattle or meat or other provisions that are diseased or decayed, or otherwise, from their condition and quality, unfit for human use or consumption. Such articles are not merchantable; they are not legitimate subjects of trade and commerce. They may be rightly outlawed as intrinsically and directly the immediate sources and causes of destruction to human health and life. The self-protecting power of each State, therefore, may be rightfully exerted against their introduction and such exercises of power can not be considered regulations of commerce prohibited by the Constitution."

Reference was made to the observation of Justice Catron in the *License cases*, that if from the nature of the article, it did not belong to commerce or if its condition from putrescence or other cause is such when it is about to enter a State that it no longer belongs to commerce, or in other words, is not a merchantable article, then the State power

may exclude its introduction: and it is said that by this legislation Congress has in effect declared that liquors do not belong to commerce, are not commercial articles, and has left it to the State to effectually exclude their introduction into the State.

But in *Louisville & Nashville Railroad Company v. F. W. Cook Brewing Company* (223 U. S. 70-82) Justice Lurton said:

"By a long line of decisions, beginning even prior to *Leisy v. Hardin* (135 U. S. 100), it has been indisputably determined:

"(a) That beer and other intoxicating liquors are a recognized and legitimate subject of interstate commerce."

Senator Sutherland stated during the discussion in the Senate:

"There are 8 States in the Union which have passed laws prohibiting the sale of intoxicating liquors. There are 40 States under whose laws the sale of intoxicating liquors under some circumstances is legitimate and proper, but there is no State in the Union that has thus far undertaken to forbid the purchase or the use of intoxicating liquors."

In *Austin v. Tennessee* (179 U. S. 343) Mr. Justice Brown held that cigarettes could not be classed with diseased cattle or meats, decayed fruit, or other articles the use of which is a menace to the health of the entire community, and quoted as pertinent to the case the language of Chief Justice Taney in the *License Cases* (5 How. 504), as follows:

"But spirits and distilled liquors are universally admitted to be subject of ownership and property, and are therefore subjects of exchange, barter and traffic, like any other commodity in which a right of property exists and Congress, under its general power to regulate commerce with foreign nations, may prescribe what article of merchandise shall be admitted and what excluded; and may, therefore, admit or not, as it shall deem best, the importation of ardent spirits."

That regulation of commerce may sometimes take the form of prohibition of traffic in certain articles can not

be disputed. It was so with respect to lottery tickets in the *Lottery Case* (188 U. S. 321).

In *Rasmussen v. Idaho* (181 U. S. 198), a State statute prohibiting the introduction of sheep if found subject to scab or epidemic disease liable to be communicated to other sheep, was upheld, and in *Plumley v. Massachusetts* (155 U. S. 461), a Massachusetts statute prohibiting the sale of oleomargarine artificially colored so as to cause it to look like yellow butter, brought into Massachusetts, was upheld upon the ground that the statute only forbade the practice of frauds upon the general public, seeking to suppress false pretensions, and to promote fair dealing in an article of food; and that the freedom of commerce among the States did not demand a recognition of the right to the practice of deception upon the public in the articles dealt with, even if the articles may have become articles of trade of the country.

So in *Hipolite Egg Co. v. United States* (220 U. S. 45), the provisions of the pure food and drug act of 1906, prohibiting the carriage of adulterated articles in interstate commerce, and authorizing the seizure and condemnation of the same while in transit or in original or unbroken packages after reaching destination, were upheld, upon the power of Congress to regulate interstate commerce; and applying the principle of the *Lottery case* it was held that regulation might in such instance take the form of entire prohibition. The court said, per McKenna, J.:

"The statute rests, of course, upon the power of Congress to regulate interstate commerce, and, defining that power, we have said that no trade can be carried on between the States to which it does not extend, and have further said that it is complete in itself, subject to no limitations except those found in the Constitution. We are dealing, it must be remembered, with illicit articles—articles which the law seeks to keep out of commerce, because they are debased by adulteration, and which law punishes them (if we may so express ourselves) and the shipper of them. There is no denial that such is the purpose of the law, and the only limitation of the power to execute such purpose which is urged is that the articles must be apprehended in

transit or before they have become a part of the general mass of property of the State. In other words, the contention attempts to apply to articles of illegitimate commerce the rule which marks the line between the exercise of Federal power and State power over articles of legitimate commerce. The contention misses the question in the case. There is here no conflict of national and State jurisdictions over property legally articles of trade. The question here is whether articles which are outlaws of commerce may be seized wherever found, and it certainly will not be contended that they are outside of the jurisdiction of the National Government when they are within the borders of a State."

In the recent decision of *Hoke v. U. S.* (Feb. 24, 1913), the Supreme Court in upholding the constitutionality of the Mann white-slave act of June 25, 1910 (36 Stat. 825), put the power squarely upon the commerce clause and the right of prohibition of "a right to be exercised in immorality" on the same basis as the laws prohibiting the carrying of obscene literature or lottery tickets or cattle with infectious diseases. It may be admitted that under the authority of these decisions Congress might, if it chose, prohibit the carriage in interstate commerce of intoxicating liquors in the exercise of its power to regulate such commerce. In the *Hoke case* (supra) Justice McKenna said:

"There is unquestionably a control in the States over the morals of their citizens, and, it may be admitted, it extends to making prostitution a crime. It is a control, however, which can be exercised only within the jurisdiction of the States, but there is a domain which the States can not reach and over which Congress alone has power; and if such power be exerted to control what the States can not, it is an argument for—not against—its legality. Its exertion does not encroach upon the jurisdiction of the States. * * *

"Our dual form of government has its perplexities, State and Nation having different spheres of jurisdiction, as we have said, but it must be kept in mind that we are one people, and the powers reserved to the States and those

conferred on the Nation are adapted to be exercised, whether independently or concurrently, to promote the general welfare, material and moral. This is the effect of the decisions, and surely if the facility of interstate transportation can be taken away from the demoralization of lotteries, the debasement of obscene literature, the contagion of diseased cattle or persons, the impurity of food and drugs, the like facility can be taken away from the systematic enticement to and the enslavement in prostitution and debauchery of women and, more insistently, of girls."

It may be admitted that the facility of interstate transportation can also be taken away from the demoralization of the use of intoxicating liquors; but, as was said by Mr. Justice Brewer in the case of *Adams Express Company v. Kentucky* (206 U. S. 129):

"Much as we may sympathize with the efforts to put a stop to the sales of intoxicating liquors in defiance of the policy of a State, we are not at liberty to recognize any rule which will nullify or tend to weaken the power vested by the Constitution in Congress over interstate commerce."

But this bill does not declare liquor to be an outlaw of commerce. It does not prohibit as a uniform rule its carriage in interstate commerce. It proposes to turn over the whole subject to the conflicting laws of 48 States.

The recognition of the right of Congress not directly to exercise the power to regulate commerce in liquors but to abdicate it, and to submit the whole question in traffic in liquors to the varying decisions of the different States, is not the exercise by the National Government of its power in such manner as it has exercised it respecting the transportation of adulterated food, diseased cattle, obscene literature, lottery tickets, or women for immoral purposes. This objection is met by the contention that the rule of uniformity in regulations of interstate commerce is not absolute, and that the proposed legislation falls within the same category as those which have been sustained as valid by the Supreme Court, and reference is made to the legislation permitting States to enact pilot laws, the provisions of the bankruptcy act permitting the exemptions authorized by the laws of the States respectively, and the like.

When the Constitution took effect, pilot laws existed in several States, and were subsequently enacted in others. In all of such States they have been changed from time to time according to the will of their respective legislatures. The act of August 7, 1789, section 4 (1 Stat. 54) provided that the pilots should be regulated by the laws of the States or "until further legislative provision should be made by Congress." It was held that the power over the subject of pilotage fell within that provision of the regulation of commerce which might be exercised by the States, but only until Congress should see fit to act upon the subject.

The decision in *Cooley v. Board of Wardens of Port of Philadelphia* (12 How. 299) was put upon the peculiar nature of pilotage and the uniform practice of the Government from the adoption of the Constitution which brought the regulation of that part of commerce within the class of powers which might be exercised by the States, unless and until Congress should choose to interfere, and then only subject to such restrictions as Congress might see fit to interpose.

"The power to regulate commerce," said Mr. Justice Swayne in *Gilman v. Philadelphia* (3 Wall. 713) "covers a wide field, and embraces a great variety of subjects. Some of these subjects call for uniform rules and national legislation; others can be best regulated by rules and provisions suggested by the varying circumstances of different localities, and limited in their operation to such localities respectively. To this extent the power to regulate commerce may be exercised by the States."

"Whether the power in any given case is vested exclusively in the General Government depends upon the nature of the subject to be regulated. Pilot laws are regulations of commerce; but if a State enact them in good faith, and not covertly for another purpose, they are not in conflict with the power 'to regulate commerce' committed to Congress by the Constitution."

In *Hanover National Bank v. Moyses* (186 U. S. 181) the court upheld as valid a provision in the bankruptcy law of 1898, which allowed to bankrupts the exemptions

prescribed by the State laws in force at the time of the filing of the petition in the State wherein they have had their domicile for six months or the greater portion thereof immediately preceding the filing of the petition. It was contended that this violated Article I, section 8, paragraph 8, of the Constitution because it did not establish "uniform laws on the subject of bankruptcy throughout the United States." But the court held that such exemptions had been sustained for the reason that it was made a rule of the law to subject to the payment of debts under its operation only such property as could by judicial process be made available for the same purpose. One of the effects of a bankruptcy law, it was stated, is that a general execution upon it in favor of all the creditors of the bankrupt reaching all his property subject to levy and applying it to the payment of his debts subject to their respective priorities.

"It is quite proper, therefore, to confine its operation to such property as other legal process could reach. A rule which operates to this effect throughout the United States is uniform within the meaning of that term, as used in the Constitution." (Citing *In re Deckert*, 2 Hughes, 183.)

The court expressed its concurrence in this view and held "that the system is in the constitutional sense, uniform throughout the United States, when the trustee takes in each State whatever would have been available to the creditors if the bankruptcy law is uniform, although it may result in certain particulars differently in different States."

The statute forbidding the shipment in interstate commerce of game killed in violation of State laws (Criminal Code, secs. 242, 244) sustained in *Rupert v. U. S.* (181 Fed. 87), is based upon the principle announced in *Geer v. Connecticut* (161 U. S. 519) that game birds belong to the people of the respective States in their sovereign capacity and that they are not the subject of external or interstate commerce unless permitted by the laws of the State. The distinction between internal and external or interstate commerce, said the court, "is marked and has always been recognized by this court."

Representative Webb sought to justify the bill on the analogy of the local-option measures enacted in the States.

"Strictly speaking," he said, "this law is not a prohibition law. It is a local option measure to give to the States what they have always been entitled to under our interpretation of the Constitution—the right to control this troublesome question for themselves." (Cong. Rec. vol. 49, p. 3445).

"The principle upon which local option laws, so called, have been sustained," said Fuller, C. J., in *In re Rahrer* (140 U. S. 561), "is that while the legislature can not delegate its power to make a law, it can make a law which leaves it to municipalities or the people to determine some fact or state of things, upon which the action of the law may depend; but we do not rest the validity of the act of Congress on this analogy. The power over interstate commerce is too vital to the integrity of the Nation to be qualified by any refinement of reasoning. The power to regulate is solely in the General Government, and it is an essential part of that regulation to prescribe the regular means for accomplishing the introduction and incorporation of articles into and with the mass of property in the country or State."

I find no decision which sustains any such delegation of legislative power as supports the local option provisions of State laws relating to traffic in liquor.

Representative Webb also sought to justify the law upon the principle of those cases which delegate the duty or power to an individual of finding some fact before a congressional act takes effect. (Cong. Rec. vol. 49, p. 3449.) These cases are well understood. The latest one in the Supreme Court is *United States v. Grimaud* (220 U. S. 506). That and similar cases turned upon the well-recognized principle of Congress declaring a general rule and devolving upon a subordinate agency the power to ascertain when the facts brought a particular case within the rule. But here Congress does not declare a general rule. It does not provide that liquor shall not be, as a general rule, transported in interstate commerce; it does not declare liquor

to be an outlaw of commerce; it does not declare liquor to be deleterious to health or destructive of good morals; but it declares that when one of the parties interested in liquor which is the subject of an interstate shipment, intends to introduce it into a State in violation of the laws of that State, its carriage shall be unlawful. Such regulation can not be sustained on the principles in the *Grimaud case* or those similar to it.

Finally, Senator Kenyon maintained that the purpose of the bill "and its only purpose, is to remove the impediment existing as to the States in the exercise of their police powers regarding the traffic or control of intoxicating liquors within their borders."

But it is unnecessary to rehearse the reasoning in the various decisions heretofore quoted which dispose of this contention.

The proposition begs the whole question under consideration and can only be conceded if it be held that Congress can abdicate entirely its power over interstate commerce in an article which it does not itself declare to be "an outlaw of commerce," but which it leaves to the varying legislation of the respective States to more or less endow with qualities of outlawry. Without prolonging this discussion in which I have endeavored to meet and analyze the various contentions set forth in behalf of this bill, I am compelled to the conclusion that it is not only of doubtful constitutionality, but that unless the Supreme Court shall recede from a well-settled line of decisions extending over a long period of years, it would most certainly declare this legislation to be without the constitutional powers of Congress.

Very respectfully,

GEORGE W. WICKERSHAM.

THE PRESIDENT.

PARCEL POST—EXECUTIVE DEPARTMENTS.

The Executive Departments and the officers of the Government are entitled to the benefit of the parcel-post law, and penalty envelopes or labels may be used in sending by parcel-post fourth-class matter not exceeding 11 pounds in weight.

DEPARTMENT OF JUSTICE,
February 28, 1913.

SIR: I have the honor to acknowledge the receipt of your communication of January 30 ultimo, asking to be advised whether your Department, its various bureaus and officers, are entitled to the benefit of the parcel-post law, and whether they have the right to send by parcel post fourth-class matter not exceeding 11 pounds in weight, under penalty envelope or label.

From your letter it appears that on January 22 the Postmaster General, replying to a request from your Department, advised you that an Executive Department or officer of the Government who desired to send in the mails official fourth-class matter in excess of 4 pounds and not coming within any of the exceptions provided by the acts he mentions, was required to affix thereto the necessary postage in distinctive parcel-post stamps, as provided by section 8 of the act of August 24, 1912; while on January 24 the Comptroller of the Treasury, in response to a like request, expressed the opinion that any appropriation for your Department or any of its bureaus which was available for the payment of freight or express charges on a package not exceeding 11 pounds in weight was also available for the purchase of parcel-post stamps for use in transmitting a similar package through the mails, "provided said package can not legally be transmitted under a penalty envelope or label."

I presume that the proviso last quoted raises the second question upon which you desire the opinion of this Department, viz, whether packages of the kind mentioned can legally be transmitted under a penalty envelope or label. It follows that a determination of this question, although involving a review of the ruling of the Postmaster General, does concern a matter arising in the administration of

your Department, namely, the propriety of expending the appropriation referred to in the purchase of parcel-post stamps for use on official fourth-class matter. I therefore proceed to a consideration of the problem presented by your second question.

The pertinent provisions of the act of August 24, 1912, establishing the parcel post are as follows:

"SEC. 8. That hereafter fourth-class mail matter shall embrace all other matter, including farm and factory products, not now embraced by law in either the first, second, or third class, not exceeding eleven pounds in weight, nor greater in size than seventy-two inches in length and girth combined, nor in form and kind likely to injure the person of any postal employee or damage the mail equipment or other mail matter and not of a character perishable within a period reasonably required for transportation and delivery.

* * * * *

"That the rate of postage on fourth-class matter weighing not more than four ounces shall be one cent for each ounce or fraction of an ounce; and on such matter in excess of four ounces in weight the rate shall be by the pound, as hereinafter provided, the postage in all cases to be prepaid by distinctive postage stamps affixed. (37 Stat. 557.)"

In determining whether the words "the postage in all cases to be prepaid by distinctive postage stamps affixed" were intended to prevent your Department from sending under the penalty label fourth-class matter not exceeding 11 pounds in weight, it will be helpful to review briefly the course of legislation dealing with the classification of mail matter and the prepayment of postage and conferring the penalty privilege.

Prior to the enactment of the statute creating the penalty privilege, the following sections of the Revised Statutes were in force:

"SEC. 3896. Postage on all mail matter must be prepaid by stamps at the time of mailing, unless herein otherwise provided for.

"SEC. 3897. All mail matter of the third class must be prepaid in full in postage stamps at the office of mailing."

The act of which section 3896 was a part contained no provision exempting governmental matter from the operation of that section. In fact, the Departments were expressly required to purchase special stamps and stamped envelopes for official use. (R. S., sec. 3915, as amended Feb. 27, 1877, 19 Stat. 250.)

At this time the third class included merchandise as well as miscellaneous printed matter. (R. S., sec 3878.) The present system of classification was adopted and the weight limit of all classes fixed by the act of March 3, 1879, sections 17 and 20 (20 Stat. 359, 360), which provides:

"That mail matter of the third class shall embrace books, transient newspapers, and periodicals, circulars, and other matter wholly in print * * * and postage shall be paid at the rate of one cent for each two ounces or fractional part thereof, and shall fully be prepaid by postage stamps affixed to said matter. * * *

"SEC. 20. That mailable matter of the fourth class shall embrace all matter not embraced in the first, second, or third class which is not in its form or nature liable to destroy, deface, or otherwise damage the contents of the mail bag, or harm the person of anyone engaged in the postal service, and is not above the weight provided by law, which is hereby declared to be not exceeding four pounds for each package thereof, except in case of single books weighing in excess of that amount, and except for books and documents published or circulated by order of Congress, or official matter emanating from any of the departments of the Government. * * *."

Section 20 of this act was amended by the act of June 8, 1896 (29 Stat. 262), by the insertion of the words "printed or written" before the phrase "official matter emanating from any of the Departments of the Government."

Similar provision for the prepayment of postage on first-class matter is contained in section 9 of the act of March 3, 1879 (20 Stat. 358).

The penalty privilege for official business was brought into being by the act of March 3, 1877 (19 Stat. 335). Section 5 of that act is in part as follows:

"SEC. 5. That it shall be lawful to transmit through the mail, free of postage, any letters, packages, or other matters relating exclusively to the business of the Government of the United States: *Provided*, That every such letter or package to entitle it to pass free shall bear over the words "official business" an indorsement showing also the name of the Department; and if from a bureau or office, the names of the Department and bureau or office, as the case may be, whence transmitted. * * *."

The privilege thus conferred was extended by section 29 of the act of March 3, 1879 (20 Stat. 362), which, as amended by section 3 of the act of July 5, 1884 (23 Stat. 158), reads:

"The provisions of the fifth and sixth sections of the act entitled 'An act establishing post-routes, and for other purposes' approved March third, eighteen hundred and seventy-seven, for the transmission of official mail matter be, and they are hereby, extended to all officers of the United States Government, not including members of Congress, the envelopes of such matter in all cases to bear appropriate indorsements containing the proper designation of the office from which or officer from whom the same is transmitted, with a statement of the penalty for their misuse. * * * And section thirty-nine hundred and fifteen of the Revised Statutes of the United States, so far as the same relates to stamps and stamped envelopes for official purposes, is hereby repealed."

The sweeping provisions of these acts have heretofore been qualified only by the act of June 26, 1906 (34 Stat. 467, 477), which declares:

"That hereafter no article, package, or other matter, except postage stamps, stamped envelopes, newspaper wrappers, postal cards, and internal-revenue stamps, shall be admitted to the mails under a penalty privilege, unless such article, package, or other matter, except postage stamps, stamped envelopes, newspaper wrappers, postal cards, and

internal-revenue stamps would be entitled to admission to the mails under laws requiring payment of postage."

Such was the state of the law when section 8 of the act of August 24, 1912 (37 Stat. 557), known as the "Parcel post law" was passed.

An examination of the above statutes leads of necessity to the following conclusions:

(1) The two sets of enactments dealing respectively with prepayment of postage and the penalty privilege were adopted and subsequently amended without express reference to one another. Indeed, section 3896 of the Revised Statutes is sufficiently absolute in its terms to forbid the use of penalty envelopes in all cases, were it not modified by subsequent legislation.

(2) Section 5 of the act of March 3, 1877, indicates no intention on the part of Congress to restrict the penalty privilege to classes of mail matter existing at the time of its enactment. On the contrary, it refers in terms to "*any* letters, packages, or other matter relating exclusively to the business of the Government." This language is plainly broad enough to cover any class thereafter established, or any change in the weight limit of an existing class, unless the act creating the new limit or classification should restrict the scope of section 5 by excluding the Government, expressly or by necessary implication, from the exercise of the franking privilege under the conditions thereby created.

(3) Applying to the act of June 26, 1906, a familiar rule of construction, it follows that *any* "article, package, or other matter" emanating from a Department or officer of the Government, which "would be entitled to admission to the mails under laws requiring the prepayment of postage," might be "admitted to the mails under a penalty privilege," subject, of course, to the requirements of the act of 1877 that it relate "exclusively to the business of the Government." In other words, any such governmental matter might be sent through the mails under the penalty privilege if, and only if, it could have been sent by a private individual under proper postage; in short, if it was mailable matter and within the 4-pound limit.

(4) The resemblance between section 3896 of the Revised Statutes and the portion of section 8 of the parcel-post law requiring "in all cases" the prepayment of postage suggests the inference that the later requirement was taken from the Revised Statutes section without intention to bring about a result other than that which the earlier provision had effectuated. The additional proviso in section 3896, "unless herein otherwise provided for," must be read in the light of the situation at the time of its enactment, when the penalty privilege for official matter had not come into existence.

It is apparent from what has been said that the free-mailing privilege, as accorded to Executive Departments and officers of the Government by the act of 1877 and later acts, does not need to be increased by the terms of the parcel-post law in order to become operative thereunder, but is extended automatically to the new classification, unless there is something in that law which limits its normal application. It only remains to discover, therefore, whether Congress, in enacting the provisions of section 8, which deals with the prepayment of postage, intended to restrict or qualify the scope of the acts above mentioned.

To determine this question it becomes necessary to examine the provision involved in relation to its context. The sentence of which it is a part prescribes the rate of postage on fourth-class matter up to 4 ounces in weight and provides that "on such matter in excess of 4 ounces in weight the rate shall be by the pound, as hereinafter provided"; then follows the provision in question. Apparently, therefore, its primary purpose is to make imperative the prepayment of postage and the use of distinctive parcel-post stamps "in all cases" of the kind previously mentioned; i. e., where the rate by the pound applies. In short, the provision simply means that wherever postage is payable, it must be paid in the manner prescribed. So construed, there is no inconsistency between section 8 of the parcel-post act and the statutes which deal with the free privilege. It must be remembered that the earlier acts confer that privilege as to "any * * * matters relating exclu-

sively to the business of the Government" which "would be entitled to admission to the mails *under laws requiring payment of postage.*" That section 8 is such a law can not be questioned. Since repeals by implication are not to be favored, that construction is preferable which does not limit or qualify by indirection the broad powers which these acts create.

There is another consideration which is entitled to weight in this connection. The weight limit of all classes of mail matter under the act of 1896 was 4 pounds. The parcel-post act raises the limit of fourth-class matter to 11 pounds, but fixes at 4 ounces the limit of the old order of fourth-class matter, on which postage is computed by the ounce; all fourth-class matter over that weight comes within the parcel-post classification. The Postmaster General concludes that the various Departments must pay postage on all fourth-class matter over 4 pounds in weight. No reason is seen, however, for adopting 4 pounds as the limit under the law as it now stands. Either the penalty privilege is not restricted or qualified by the parcel-post act, in which case any departmental fourth-class matter under 11 pounds may be sent free under the penalty envelope, or the laws conferring that privilege do not apply to the new kind of fourth-class matter created by the parcel-post act—that is, matter weighing more than 4 ounces to which the pound rate applies—in which event all fourth-class matter over 4 ounces in weight must be prepaid and stamped by the various departments. It is hardly conceivable that Congress intended any such diminution of the penalty privilege, as heretofore established, or that, had this been its intent, it would not have used explicit language to that effect. Consequently the first of these two alternatives seems to me the only tenable one.

I am, therefore, of the opinion that both of your questions should be answered in the affirmative.

Respectfully,

GEORGE W. WICKERSHAM.

The SECRETARY OF THE INTERIOR.

**TRANSFER OF OFFICE OF RECORDER OF DEEDS OF THE
DISTRICT OF COLUMBIA**

It would require the sanction of Congress to place the office of recorder of deeds of the District of Columbia under the administrative control and supervision of the Attorney General.

DEPARTMENT OF JUSTICE,
March 1, 1913.

SIR: I have the honor to acknowledge the receipt of your letter of February 12, 1913, in which you submit for my consideration the following question:

"Would it be feasible for the President, if he so desired, to place the office of recorder of deeds under the administrative control and supervision of the Attorney General by Executive order, or would it be necessary to have the approval of Congress?"

Subchapter 4 of the act of March 3, 1901 (31 Stat. 1189, 1275), entitled "An act to establish a code of law for the District of Columbia," as amended, contains the following:

"DEEDS, RECORDER OF.

"**SEC. 548. *Appointment and duties.***—There shall be a recorder of deeds of the District, appointed by the President, by and with the advice and consent of the Senate, who shall record all deeds, contracts, and other instruments in writing affecting the title or ownership of any real estate or personal property in the District which shall have been duly acknowledged and certified, and who shall perform all requisite services connected therewith, and shall have charge and custody of all the records, papers, and property appertaining to his office."

The act also provides for a deputy recorder, to be appointed by the recorder of deeds, and in case of a vacancy in the office of recorder by death, resignation, or other cause that the deputy recorder shall act until a recorder shall be duly appointed and qualified, and prescribes various duties which shall appertain to the office.

Questions more or less analogous to the present inquiry have been from time to time considered by former Attorneys General.

In 6 Opinions, 346, speaking with reference to the organization of the Executive Departments, Attorney General Cushing said:

"The organization of the Executive Departments of administration implies order, correspondence, and combination of parts, classification of duties, in a word, system; otherwise there is waste and loss of power, or conflict of power, either of which is contrary to the public service, in the regard of so much work to be done by such and such persons, and at a given cost of either time or money. Besides which, in a political relation, want of due arrangement of public functionaries and their functions, is want of due responsibility to society and to the law.

"Accordingly, it has been the general purpose of Congress, at all times, both as to the great subdivision of Departments, and the arrangement of the duties of each, to classify and to systematize."

In 10 Opinions, 11, the question was as to the propriety of a proposed order detailing an Army officer for special duty as inspector general of militia for the United States, whereby, under the direction of the Secretary of War, such officer would have charge of all business relating to the militia, the practical effect of which would be to constitute a separate bureau, of which the officer in question would be the head. In the absence of legislation with respect thereto, it was proposed to accomplish the end in view by an Executive order. In response to this suggestion the Attorney General said:

"It proposes the establishment of a bureau heretofore unknown in the organization of the War Department. That Department is subdivided into a number of subordinate departments, as the Quartermaster's, the Commissariat, the Paymaster's, the Ordnance, the Engineer's, and the Medical, all of which are created and their respective duties defined by legislative enactment. Some of them are called bureaus, and in some, the duties are subdivided, and each subdivision is called a bureau, but all are established to perform duties specially authorized by law. The same remark is true of the bureaus in the other departments of

the Government, as will be seen by reference to the acts creating them. * * * In view of these precedents I can not avoid the conclusion that the creation of a bureau in the War Department can only be authorized by act of Congress, designating its chief, defining his duties, and providing for the appointment or transfer of the necessary clerical force and messenger."

Again, in 22 Opinions, 62, wherein there was a request for an opinion as to whether an act requiring not less than seven hours of labor each day of all clerks and other employees in their respective departments included clerks of the Civil Service Commission, it was said:

"* * * No board, commission, bureau, or office which is not expressly or by implication under the control of the head of one of these Departments can be considered as belonging properly to an Executive Department.

"The Civil Service Commission was created by act of Congress approved January 16, 1883. It is not attached in any wise to any of the Executive Departments, nor is it subject in any wise to the control of any of the heads of those Departments. There is nothing in the act constituting the commission which makes it subject to any regulation or control except that of the President himself. It follows therefore, that when an act of Congress refers, as does the act of March 15, 1898, to "heads of the several Executive Departments," it does not embrace and can not properly be applied to any branch, office, or bureau which is not under the control of one of the Executive Departments presided over by a Cabinet officer."

And in 27 Opinions, 542, wherein there was a request for an "opinion upon the question whether the Secretary of Commerce and Labor may lawfully consolidate, for all purposes of administration, operation, and control, the Bureau of Manufactures and the Bureau of Statistics into one bureau, to be called the 'Bureau of Foreign and Domestic Commerce,'" speaking with respect to the act creating that department, the Attorney General declared:

"In the act of February 14, 1903, the only authority the Secretary has to rearrange, consolidate, or alter the distri-

bution of his force is with respect to divisions or bureaus *transferred* from other Departments. While the Bureau of Statistics is a combination of forces so transferred, the Bureau of Manufactures is specifically created as such by Congress.

"I am therefore of the opinion that, while the practical good and even necessity of the rearrangement under proper authority from Congress is manifest, the proposed consolidation and creation of a new bureau in your Department is not now authorized by law."

The history of the legislation relating to the creation and organization of the executive departments shows clearly that it has been the practice of Congress not only to establish the executive departments, but also to prescribe with greater or less detail the internal arrangement thereof. (Goodnow's *Principles of the Administrative Law of the United States*, p. 123; Wyman's *Administrative Law*, secs. 58 and 59.)

Whether an office shall be under the jurisdiction of one of the executive departments, and if so, the particular department to which it shall be assigned, are questions the determination of which, in my judgment, call for the exercise of a legislative function. This view derives additional force in the present instance from the fact that the inquiry relates to the transfer to one of the executive departments of an office which is primarily a part of the municipal machinery which Congress has provided for the District of Columbia. Whatever may be its true nature, the District of Columbia in some aspects at least constitutes a separate political community, and by reason thereof its strictly municipal functions are, in a certain sense at all events, to be distinguished from those which belong solely to the operations of the General Government.

To declare that the office of recorder of deeds of the District of Columbia shall be under the administrative supervision of one of the executive departments involves, in my opinion, the exercise of a legislative power. The change which your inquiry suggests, therefore, requires the sanction of Congress, and in the absence of legislative authority therefor, either express or implied, it does not

appear to be a subject matter which is properly cognizable by Executive action.

Respectfully,

GEORGE W. WICKERSHAM.

The PRESIDENT.

PASSENGERS' BAGGAGE—LADING AND UNLADING OF
VESSELS AT NIGHT.

The word "cargo" as used in section 5 of the act of February 13, 1911 (36 Stat. 901), relating to the lading and unlading of vessels at night, does not include passengers' baggage.

DEPARTMENT OF JUSTICE,

March 3, 1913.

SIR: I have the honor to reply to your letter of October 4, 1912, requesting my opinion whether passengers' baggage is "cargo" within the meaning of the act of February 13, 1911, section 5 (36 Stat. 901), entitled "An act to provide for the lading and unlading of vessels at night, the preliminary entry of vessels, and for other purposes."

After carefully considering the various opinions heretofore rendered by the Solicitor of the Treasury and the Comptroller of the Treasury and the briefs and oral arguments submitted by parties in interest on both sides, I am of opinion that the word "cargo" used in the said section does not include "passengers' baggage."

The section reads as follows:

"SEC. 5. That the Secretary of the Treasury shall fix a reasonable rate of extra compensation for night services of inspectors, storekeepers, weighers, and other customs officers and employees in connection with the lading or unlading of cargo at night, or the lading at night of cargo or merchandise for transportation in bond or for exportation in bond, or for the exportation with benefit of drawback, but such rate of compensation shall not exceed an amount equal to double the rate of compensation allowed to each such officer or employee for like services rendered by day, the said extra compensation to be paid by the master, owner, agent, or consignee of such vessel or other conveyance, whenever such special license or permit for

immediate lading or unlading or for lading or unlading at night or on Sundays or holidays shall be granted, to the collector of customs, who shall pay the same to the several customs officers and employees entitled thereto according to the rates fixed therefor by the Secretary of the Treasury. Customs officers acting as boarding officers, and any customs officer who may be designated for that purpose by the collector of customs, are hereby authorized to administer the oath or affirmation herein provided for, and such boarding officers shall be allowed extra compensation for services in boarding vessels at night or on Sundays or holidays—at the rate prescribed by the Secretary of the Treasury as herein provided, the said extra compensation to be paid by the master, owner, agent, or consignee of such vessels.”

The precise question is whether these provisions authorize you to fix extra compensation for customs examiners for night examination of passengers and the personal baggage which accompanies them; the payments to be made by the “master, owner, agent, or consignee.”

Neither passengers nor their personal baggage being expressly mentioned in this section or in any other section of the act, the question, as your letter states, is whether they are to be deemed included by force of the word “cargo.”

Certainly nothing on the face of the section affirmatively compels such a construction, and the language in its ordinary and normal implications hardly permits of it. No terms are used especially appropriate to passengers' baggage, nor are there any provisions for method or payment which would be appropriate to that subject. Indeed, the vital words and phrases which define the purport of the section are inappropriate to such a construction, as, for instance, “storekeepers,” “weighers,” “merchandise for transportation in bond,” “or for exportation in bond,” “or for exportation with benefit of drawback,” and “the said extra compensation to be paid by the master, owner, agent, or consignee [not passengers] of such vessel.”

The context corroborates this view of the text.

Section 1, for instance, provides for a special license for unlading not all vessels, but only those vessels which belong

"to a line designated by the Secretary of the Treasury as a common carrier of *bonded merchandise*."

Section 3 requires the filing of a bond to indemnify the United States for any liabilities resulting from the issue of a special license, though such liabilities would not occur in the case of personal baggage.

Section 4 provides especially for the issue of licenses and permits to vessels with goods in transit.

None of these provisions are appropriate to either passengers or their personal baggage.

But if the meaning of the section, considered both in itself and in relation to its context, were seriously doubtful, the history of the legislation clearly shows that the construction contended for is not the correct one.

From almost the beginning of its customs legislation Congress has distinguished carefully between baggage and freight, and for customs purposes it has assimilated the baggage to the passenger and treated it by a separate and distinct system.

Section 46 of the act of March 2, 1799 (1 Stat. 627, 661), contained a specific, detailed, and complete plan for the treatment of passengers' baggage, entirely separate from the other sections, which outlined the methods of handling consigned merchandise. Particularly the subject of unloading permits, etc., was specifically covered as to baggage by this special section, different provisions being made in other sections (27 and 28) for the unloading of the ordinary freight.

This distinction has continued right on down from 1799.

In the Revised Statutes the baggage provisions of section 46 became Revised Statutes, sections 2799 to 2803, and the freight provisions of sections 27 and 28 became Revised Statutes, sections 2869 to 2874. This was clearly explained by the Circuit Court of Appeals for the Second Circuit in *U. S. v. One Pearl Necklace* (111 Fed. 164, 169).

Now, it is indisputable that the act of 1911 descends not from section 46 of the act of 1799 and Revised Statutes, sections 2799 to 2803, but from the other line (secs. 27 and 28 of the act of 1799; R. S., secs. 2869-2874, and the act of June 30, 1906, 34 Stat. 633). This is plain on the face of

the acts, and indeed it is conceded. The repealer, for instance (sec. 6, act of 1911), does not refer to the baggage sections, but does refer to the merchandise sections.

In my opinion it is clear from this legislative history that the word "cargo" was intended to relate to the subject matter of the series of statutes dealing with freight and was not intended to relate to the subject matter of the separate provisions which deal with baggage.

Conclusive confirmation of this view is afforded by the fact that Congress itself recognized the inapplicability to passengers' baggage of Revised Statutes, section 2871 (the section from which particularly section 5 of the act of 1911 descends), by passing the act of December 16, 1902 (32 Stat. 753). This act authorized extra pay for night work to examiners of baggage, and it would have been totally unnecessary if Revised Statutes, section 2871, had already covered that subject.

Prior to 1894 there was no occasion for making any such provisions with respect to baggage, because there was no substantial practice of discharging passengers at night. In that year the subject arose before the Treasury Department, the claim being made for the first time that Revised Statutes, section 2871, covered the baggage; but notwithstanding conflicting opinions of the Solicitor of the Treasury on the subject (those of Apr. 3, 1894, and Apr. 14, 1898, sustaining the claim, and that of Apr. 12, 1895, denying it), the administrative practice has been uniformly against it; and, as I have said, it has the recognition of Congress itself contained in the act of 1902. Also it is supported by the advisory opinion, dated September 5, 1911, of the Comptroller of the Treasury construing the present act.

It has been argued that even if the word "cargo" in Revised Statutes, section 2871 (as amended by the act of 1906, *supra*), did not include passengers' baggage, it was extended to do so by the insertion of the italicized words in the following clause of section 5 of the act of 1911:

"That the Secretary of the Treasury shall fix a reasonable rate of extra compensation for night services of inspectors, *storekeepers, weighers, and other customs officers*

*and employees in connection with the lading or unlading of cargo at night, * * **

This addition, however, was intended merely to extend the description of officials engaged in unlading the cargo and not to extend the meaning of the word "cargo" itself. Surely the addition of "storekeepers" or "weighers" can not imply an intention to add "baggage" to the word "cargo;" and obviously no such implication can be drawn from the addition of the words "other customs officers and employees" when those words themselves are specifically limited to workers on "cargo."

Why Congress should refuse extra pay to customs employees engaged in night work on passengers' baggage, while granting it to those engaged on cargo, is a question beyond my province to determine, so long as the intent of the statutes to do so is clear. It may be observed, however, that the principal customs work on the baggage is the examination, which occurs *after* the unloading is complete and is not necessary to the unloading itself. From the point of view of the ship, it might be considered not a part of the discharge, and Congress might therefore have thought there was less reason to make the cost of it a charge against the ship.

In the argument many considerations were advanced, based on a practical injustice to the men who have to do extra night work in the unlading of baggage, but such questions, again, are solely for the consideration of Congress, and neither the administrative nor the legal officials of the Government have any power to deal with them or in effect to reinstate the act of December 16, 1902 (32 Stat. 753, *supra*), which Congress appears, perhaps inadvertently, to have superseded by the act of March 4, 1909 (35 Stat. 1065), without providing any leeway for extra pay in this kind of work.

For these reasons, I am of opinion, as above stated, that the word "cargo" in the act referred to does not include "baggage."

Very respectfully,

WINFRED T. DENISON,

Acting Attorney General.

THE SECRETARY OF THE TREASURY.

OPINIONS
OF
HON. J. C. McREYNOLDS, OF TENNESSEE.
APPOINTED MARCH 6, 1913.

DESIGNATION OF DISBURSING CLERK FOR THE DEPARTMENT OF LABOR.

The Secretary of Labor may, with the concurrence of the Secretary of Commerce, if the public exigencies require it, designate the disbursing clerk of the Department of Commerce to disburse the moneys appropriated for the various bureaus and services of the Department of Labor until a regular disbursing clerk can be appointed, provided he is able and willing to give bond as required by section 3614 of the Revised Statutes.

DEPARTMENT OF JUSTICE,
March 14, 1913.

SIR: I have the honor to acknowledge receipt of your letter of March 8, 1913, in which you request my opinion as to whether you are "authorized to appoint the disbursing clerk of the Department of Commerce as disbursing clerk of the Department of Labor to serve without compensation additional to that provided for in his position as disbursing clerk of the Department of Commerce, to disburse such funds now appropriated for bureaus and services of the Department of Labor, until such time as I can appoint a disbursing clerk authorized by section 2 of the act creating the Department of Labor, approved March 4, 1913 (Public, No. 426)."

A disbursing clerk for your Department is authorized by section 2 of the act of March 4, 1913, which provides:

"SEC. 2. That there shall be in said Department an Assistant Secretary of Labor, to be appointed by the President, who shall receive a salary of five thousand dollars a

year. * * * There shall also be one chief clerk and a disbursing clerk, and such other clerical assistants, inspectors, and special agents as may from time to time be provided for by Congress. * * *

By the acts of August 23 and 24, 1912 (37 Stat. 360, 417), appropriations were made for the officers and employees in the various branches of the public service transferred to your Department from the Department of Commerce and Labor, but no appropriation has been made in any act for the payment of the salary of the disbursing clerk authorized by the act of March 4, 1913.

The failure of Congress to make specific provision for the salary of the disbursing clerk of your Department would not appear to be an insuperable objection to the appointment of such clerk in view of the provisions of section 176 of the Revised Statutes, which reads:

"The disbursing clerks authorized by law in the several Departments shall be appointed by the heads of the respective Departments, from clerks of the fourth class; * * *. Each disbursing clerk is entitled to receive, in compensation for his services in disbursing, such sum in addition to his salary as a clerk of the fourth class as shall make his whole annual compensation two thousand dollars a year."

The foregoing section is embraced in title 4 of the Revised Statutes, the provisions of which, by section 1 of the act of March 4, 1913, are expressly made applicable to the Department of Labor. The result is, therefore, that if there is in the bureaus transferred to your Department a clerk of the fourth class, who is qualified and available for the position of disbursing clerk, this statute requires that he shall be appointed to that position and fixes his total compensation for the services rendered by him "in disbursing," until otherwise provided by Congress.

Assuming, however, that the exigencies are such that the regular disbursing clerk so authorized and provided for can not be immediately appointed, I am advised of no provision of law which would prevent you from designating the disbursing clerk of the Department of Commerce temporarily to disburse the moneys provided for the various

bureaus and services transferred to your Department, provided such an arrangement is agreeable to the Secretary of Commerce.

There appears to be nothing in the statutes which prohibits the head of a department from permitting a clerk of his department to render additional services, without extra compensation, the necessity for which arises in his or in other departments, and this, in effect, is all I understand you wish to do. On the contrary, this right is recognized, by implication, in section 1764 of the Revised Statutes, which provides:

“Sec. 1764. No allowance or compensation shall be made to any officer or clerk, by reason of the discharge of duties which belong to any other officer or clerk in the same *or any other Department*; and no allowance or compensation shall be made for any extra services whatever, which any officer or clerk may be required to perform, unless expressly authorized by law.”

In an opinion rendered by the Comptroller of the Treasury November 13, 1907 (14 Comp Dec. 294, 296), it was held that the head of a department had authority to detail an officer, clerk, or employee of his department to perform service for another department which would not conflict with the services he was expressly employed to render. In the present case I assume there will be no such conflict, as the services to be required of the disbursing clerk of the Department of Commerce are merely those he was required heretofore to perform as disbursing clerk of the Department of Commerce and Labor.

The provision of section 3679, Revised Statutes, as amended by section 3 of the act of February 27, 1906 (34 Stat. 48), prohibiting the acceptance of voluntary service for the Government, has no application to the performance of additional service by a clerk in executive department without additional compensation, but refers to voluntary services rendered by *private persons* without authority of law. The statute was so construed by Attorney General Wickersham, in an opinion rendered February 7, 1913, in which it was held that a retired Army officer could be employed as superintendent of an Indian school or agency,

without additional compensation, notwithstanding the statutes referred to.

Nor is the designation of a clerk to perform extra duties for the Government without additional compensation an *employment* of personal service in excess of that authorized by law, within the meaning of the statutes last mentioned, or prohibited by the act of August 5, 1882 (22 Stat. 255), which deals with the subject of *employing* persons in the executive civil service of the Government at Washington without specific authority from Congress. The word "employ," as used in all these statutes, manifestly suggests a contract for services to which compensation is an incident.

Section 3614, Revised Statutes, remains to be considered. That section provides:

"Sec. 3614. Whenever it becomes necessary for the head of any Department or office to employ special agents, other than officers of the Army or Navy, who may be charged with the disbursement of public moneys, such agents shall, before entering upon duty, give bond in such form and with such security as the head of the Department or office employing them may approve."

It is unnecessary to determine whether this section contains in itself authority for the head of a department to employ special agents to disburse public moneys, although in *United States v. Potter et al.* (Fed. Cas. No. 16076) it was so construed. I doubt the correctness of this view. The real purpose of the statute seems to be to require special agents employed to disburse moneys to give bond, and the exclusion of officers of the Army or Navy implies that persons already in the executive service may be so employed and that they shall likewise give bond. In my opinion, when a person already in the executive civil service of the Government is designated to disburse public moneys, although without additional compensation, he is "employed" for that purpose within the meaning of this statute.

I have the honor, therefore, to advise you that, if it is impossible for you immediately to fill the office of disbursing clerk for the Department of Labor, you may, with the concurrence of the Secretary of Commerce, if the public

exigencies require it, designate the disbursing clerk of that department to disburse the moneys appropriated for your department until a regular disbursing clerk can be appointed, provided he is able and willing to give bond as required by section 3614, Revised Statutes.

Respectfully,

JAMES A. FOWLER,
Acting Attorney General.

THE SECRETARY OF LABOR.

EIGHT-HOUR LAW—CONSTRUCTION OF PUBLIC BUILDINGS.

In the construction of public buildings, where the Government contracts for the furnishing of the materials and labor as well as for the erection of the building but the purchases of the materials are made directly by the contractor or subcontractor, the purchases of such materials by the contractor or subcontractor are subject to the exceptions in section 2 of the eight-hour law of June 19, 1912 (37 Stat. 137).

DEPARTMENT OF JUSTICE,
March 14, 1913.

SIR: I have the honor to acknowledge the receipt of the letter of your predecessor of the 27th ultimo in regard to the construction of the act of June 19, 1912 (37 Stat. 137), regulating the hours of laborers and mechanics employed under Government contracts, and inclosing a copy of an opinion by the Solicitor of the Treasury thereon.

The question presented is whether, in the construction of public buildings, where the Government contracts for the work as a whole, i. e., for the furnishing of the materials and labor and the performance of the work, but the *purchases* of the materials are made directly by the contractor, or by some subcontractor, the exceptions in section 2 of the said act apply to the purchases of such materials by the contractor or subcontractor for use in carrying out his contract. The Solicitor of the Treasury has ruled that, whether the materials are purchased in the open market by the Government directly or in the usual manner by the contractor who is bound by his contract to furnish all labor and materials necessary to fulfill it, the exceptions of the statute apply.

The matter as to which you inquire appears to be covered in principle by the opinion of January 22, 1913, to your predecessor (30 Op. 31). Where the Government contracts for the furnishing of the materials for a public building, as well as for their erection into place, the subject matter of the contract is the materials as well as the construction; and if the materials be such as may ordinarily be bought in open market, then the contracts therefor are excepted from the operation of the act, since they are contracts "for such materials or articles as may usually be bought in open market, * * * whether made to conform to particular specifications or not."

I have the honor, therefore, to advise you that I concur in the views expressed by the Solicitor of the Treasury.

Respectfully,

J. C. McREYNOLDS.

The SECRETARY OF THE TREASURY.

**AUTHORITY OF SECRETARY OF THE TREASURY TO DIRECT
REHEARING BY THE TEA BOARD.**

The Secretary of the Treasury has no authority under the tea-importation act of March 2, 1897 (29 Stat. 604), to direct a rehearing by the "tea board" after a final rejection by the board of tea entered for importation.

DEPARTMENT OF JUSTICE,

March 17, 1913.

SIR: I have the honor to acknowledge the receipt of your letters of the 11th and 13th instant, with inclosures, in which you ask whether you have any authority under the tea-importation act of March 2, 1897 (29 Stat. 604) to direct a rehearing by the "tea board" after a final rejection by them of tea entered for importation.

I am of the opinion that you have not this authority.

The act of 1897 provides that tea entered for importation shall be examined by certain examiners for purity, quality, and fitness for consumption in comparison with certain standards to be fixed by the Secretary of the Treasury; that the collector, importer, or consignee may protest the findings of the examiners, and that in the event of such protest the matter in dispute shall be re-

ferred for decision to a board of three general appraisers to be designated by the Secretary of the Treasury.

If this board, after the examination, finds the tea equal in purity, quality, and fitness for consumption to the proper standards the collector *must* issue a permit for its release and delivery to the importer, but if, upon such "*final examination*" it shall be found inferior, the importer or consignee *must* furnish a proper bond guaranteeing its exportation within six months after "*such final reexamination.*" (Secs. 4 and 6.) Teas so rejected and exported *shall not* be reimported under the penalty of forfeiture (sec. 9).

These provisions indicate an intention that the tea board shall be the final tribunal on the question, and indeed no claim has been made, either in the briefs or in the hearing before me, that you have any formal appellate power to review its decisions. If such a structure of appeal procedure had been intended by Congress it would undoubtedly have been specifically prescribed, as it was in the case of appeals from the immigration board to the Secretary of (Commerce and) Labor and from the Board of General Appraisers to the Court of Customs Appeals.

It is claimed, however, that while possessing no power to review on appeal, the Secretary still has mandatory power to compel the board itself to rehear; but in effect the possession even of the latter power would enable the Secretary to nullify any decisions of the board unsatisfactory to him, and would be equivalent in essence to an appellate power. It would even enable him to defeat the explicit mandate of the statute that tea approved by the board "shall be released and delivered to the importer." Under such circumstances the decisions of the board would not be really "final," nor could the summary dispatch plainly contemplated by the act be attained.

The same reasons, therefore, which indicate that the Secretary has no appellate power in the strict sense, also indicate that he has no such power as this.

It is claimed, however, that the power is implied in the clause which expressly authorizes the Secretary "to enforce the provisions of the act by appropriate regulations"

(sec. 10); but there is no reason apparent for extending this clause beyond its familiar and usual import, which covers regulations of administrative and executory character subsidiary to the structure created by the act, and does not include power to alter the substance of that structure. (*Morrill v. Jones*, 106 U. S. 466; *U. S. v. Eaton*, 144 U. S. 677.)

The distinction is illustrated by the regulation of March 10, 1911 (T. D. 31367), which provides that tea rejected on account of coloring may be readmitted if reprocessed so as to eliminate the defect. By such a regulation the Secretary does not undertake to superimpose himself as a reviewing tribunal over the board, but yields to its decision and provides a method of conforming to it.

Nor does paragraph 37 of the regulations (T. D. 31343) afford a precedent, as contended. That paragraph provides that there shall be no reexamination after the decision of the board, and is a recognition, rather than a denial, of the finality to the executive officers of the board's decision.

For these reasons I concur, as above stated, with the Solicitor of the Treasury in the opinion that you have not the power suggested.

I pass the question raised in the briefs, whether the power of designation to membership in the tea board lies in the president of the Board of General Appraisers (Tariff Act of 1909, sec. 28, subsec. 12) or in the Secretary of the Treasury, as originally provided in the act of 1897 (29 Stat. 604), because it has no bearing on the subject of your inquiry, which is—whether you can order a rehearing, and not whether the past hearings have been legal. Incidentally, the latter question would seem to be one ultimately for the courts, and not for an administrative officer who has no power as an appellate tribunal.

Very respectfully,

WINFRED T. DENISON,
Assistant Attorney General.

Approved:

J. C. McREYNOLDS.

The SECRETARY OF THE TREASURY.

EIGHT-HOUR LAW—PUBLIC BUILDING CONTRACTS.

Contracts for public buildings for which appropriation was made in full prior to June 19, 1912, are not required to contain the eight-hour workday stipulation prescribed by section 1 of the act of June 19, 1912 (37 Stat. 137).

So also where the limit of cost of a public building has been fixed by law and the authority has been given to enter into contracts up to the full limit prior to June 19, 1912, but the appropriation therefor has been only partly made prior to that time, the contracts for that portion of the work appropriated for subsequent thereto are not required to contain said eight-hour stipulation.

The eight-hour law of June 19, 1912 (37 Stat. 137), has not repealed or modified the eight-hour law of August 1, 1892 (27 Stat. 340), and hence the latter still applies to work done on public buildings, no matter when the appropriation therefor may have been made.

DEPARTMENT OF JUSTICE,

March 19, 1913.

SIR: I have the honor to acknowledge the receipt of the letter of your predecessor of the 3d ultimo inclosing a copy of an opinion rendered by the Solicitor of the Treasury upon the act of June 19, 1912, regulating the hours of labor on Government work and requesting to be advised whether I concur in the opinion of the Solicitor, and, if not, what my opinion is upon the questions submitted.

The said act of June 19, 1912 (37 Stat. 137, 138), contains, at the end of section 2, the following qualification:

“* * * Nothing in this act shall be construed to
* * * apply to contracts which have been or may be entered into under the provisions of appropriation acts approved prior to the passage of this act.”

The omnibus public buildings act of May 30, 1908 (35 Stat. 545), by section 4, authorized the Secretary of the Treasury to acquire sites for and contract for the erection of certain public buildings within certain “limits of cost.” therein fixed, and section 34 provided as follows:

“SEC. 34. That hereafter in all cases where appropriations are made in part only for carrying into effect the provisions of legislation authorizing the acquisition of land for sites or for the enlargement of sites for public buildings, or for the erection of remodeling, extension, alteration, and

repairs of public buildings, the Secretary of the Treasury, unless otherwise specifically directed, be, and he is hereby, authorized and empowered to enter into contracts within the full limit of cost fixed by Congress therefor."

The specific inquiries are whether, in view of the above provision of section 2 of the act of June 19, 1912, and of section 34 of the act of May 30, 1908, the stipulation required by section 1 of the act of June 19, 1912, must be included in public building contracts entered into subsequent to January 1, 1913 (the date when the said eight-hour act went in effect), first, where the full appropriation for the building in question has been made prior to June 19, 1912; second, where the "limit of cost" of the building has been fixed by law and the Secretary of the Treasury has been authorized to enter into contracts up to that "limit of cost" prior to June 19, 1912, but where the *appropriation* has only been partly made prior to that time. The Solicitor of the Treasury has answered both of these questions in the negative.

Where the appropriation for a public building has been made in full prior to June 19, 1912, the case evidently falls within the exact terms of the exception quoted above, and the first question, therefore, must be answered in the negative.

In my opinion, the second question should likewise receive a negative answer. The authority conferred by section 34 of the act of May 30, 1908, to enter into contracts to the full "limit of cost" is granted only "where appropriations are made in part only for carrying into effect the provisions of legislation authorizing the acquisition of land for sites or for the enlargement of sites for public buildings or for the erection or remodeling, extension, alteration, and repairs of public buildings." It is, therefore, the partial appropriation which vitalizes the authority to make the complete contract, and, therefore, the complete contract is entered into "under the provisions" of an appropriation act, for, if the provision for a partial appropriation had not been made, the authority to enter into the complete contract would never have existed, and, if such partial appropriation be made prior to June 19, 1912, the

exception above referred to in the eight-hour act of June 19, 1912, applies to the whole contract.

This view is also more in accord with practical considerations. The only reason why the whole appropriation for the entire cost of the building is not made at once is because it would be wasteful to appropriate money before it is actually needed. When the "limit of cost" is fixed, and partial appropriations are made, entailing contracts up to the full limit, it is practically the same thing as though the entire cost, instead of only a part of the cost, had been appropriated for.

It must be remembered, however, that the answers given above are confined to the act of June 19, 1912, and must not be taken to apply in any way to the prior eight-hour act of August 1, 1892, which by express provision of section 2 of the act of June 19, 1912, has not been repealed or modified by the said later act. The act of August 1, 1892, therefore, still applies to work done on public buildings, no matter when the appropriation therefor may have been made.

Respectfully,

JAMES A. FOWLER,
Assistant to the Attorney General.

Approved:

J. C. McREYNOLDS.

The SECRETARY OF THE TREASURY.

EIGHT-HOUR LAW—PANAMA CANAL.

The act of March 3, 1913, regulating the hours of service of laborers and mechanics employed on Government work and persons employed in constructing, maintaining, and improving the rivers and harbors of the United States, does not apply to persons performing services similar to those of laborers and mechanics employed in connection with dredging work on the Panama Canal.

The above-mentioned act has not repealed or modified the provisions in the acts of February 27, 1906, and June 30, 1906 (34 Stat. 33, 669), relating to alien laborers and to the foremen and superintendents of such laborers.

DEPARTMENT OF JUSTICE,
April 1, 1913.

SIR: I have the honor to acknowledge the receipt of your letter of the 27th ultimo, in which you request an opinion

as to whether the act of Congress, approved March 3, 1913, entitled "An act relating to the limitation of the hours of daily service of laborers and mechanics employed upon a public work of the United States and of the District of Columbia, and of all persons employed in constructing, maintaining, or improving a river or harbor of the United States and of the District of Columbia," applies to persons employed in connection with dredging work on the Panama Canal when such persons are employed to perform services similar to those of laborers and mechanics.

You also request an opinion as to whether or not the act above mentioned repeals or modifies the provisions relating to alien laborers and to the foremen and superintendents of such laborers contained respectively in the act entitled "An act making appropriations to supply urgent deficiencies in the appropriations for the fiscal year ending June thirtieth, nineteen hundred and six, and for prior years, and for other purposes," approved February 27, 1906, and in section 4 of the act entitled "An act making appropriations to supply deficiencies in the appropriations for the fiscal year ending June thirtieth, nineteen hundred and six, and for prior years, and for other purposes," approved June 30, 1906.

The act approved March 3, 1913, is, in full, as follows:

"Be it enacted, etc., That sections one, two, and three of an act entitled 'An act relating to the limitation of the hours of daily service of laborers and mechanics employed upon the public works of the United States and of the District of Columbia' be amended to read as follows:

"SECTION 1. That the service and employment of all laborers and mechanics who are now, or may hereafter, be employed by the Government of the United States or the District of Columbia, or by any contractor or subcontractor, upon a public work of the United States or of the District of Columbia, and of all persons who are now, or may hereafter be, employed by the Government of the United States or the District of Columbia, or any contractor or subcontractor, to perform services similar to those of laborers and mechanics in connection with dredging or rock excavation in any river or harbor of the United

States or of the District of Columbia, is hereby limited and restricted to eight hours in any one calendar day; and it shall be unlawful for any officer of the United States Government or of the District of Columbia, or any such contractor or subcontractor whose duty it shall be to employ, direct, or control the services of such laborers or mechanics or of such persons employed to perform services similar to those of laborers and mechanics in connection with dredging or rock excavation in any river or harbor of the United States or of the District of Columbia, to require or permit any such laborer or mechanic or any such person employed to perform services similar to those of laborers and mechanics in connection with dredging or rock excavation in any river or harbor of the United States or of the District of Columbia, to work more than eight hours in any calendar day, except in case of extraordinary emergency: *Provided*, That nothing in this act shall apply or be construed to apply to persons employed in connection with dredging or rock excavation in any river or harbor of the United States or of the District of Columbia while not directly operating dredging or rock excavating machinery or tools, nor to persons engaged in construction or repair of levees or revetments necessary for protection against floods or overflows on the navigable rivers of the United States.

“SEC. 2. That any officer or agent of the Government of the United States or of the District of Columbia, or any contractor or subcontractor whose duty it shall be to employ, direct, or control any laborer or mechanic employed upon a public work of the United States or of the District of Columbia, or any person employed to perform services similar to those of laborers and mechanics in connection with dredging or rock excavation in any river or harbor of the United States or of the District of Columbia, who shall intentionally violate any provision of this act, shall be deemed guilty of a misdemeanor, and for each and every such offense shall, upon conviction, be punished by a fine not to exceed one thousand dollars, or by imprisonment for not more than six months, or by both such fine and im-

prisonment, in the discretion of the court having jurisdiction thereof.

“SEC. 3. That the provisions of this act shall not be so construed as to in any manner apply to or affect contractors or subcontractors, or to limit the hours of daily service of laborers or mechanics engaged upon a public work of the United States or of the District of Columbia, or persons employed to perform services similar to those of laborers and mechanics in connection with dredging or rock excavation in any river or harbor of the United States or of the District of Columbia, for which contracts have been entered into prior to the passing of this act or may be entered into under the provisions of appropriation acts approved prior to the passage of this act.”

“SEC. 4. That this act shall become effective and be in force on and after March first, nineteen hundred and thirteen.”

1. It will be perceived that the above act only regulates the employment of persons performing services similar to those of laborers and mechanics in connection with dredging or rock excavation *in any river or harbor of the United States*. Even where the work in question is done in dredging a canal already in existence, it is evidently extremely doubtful whether such work could be said to be done in a “river or harbor.” Where, as is the case with the work on the Panama Canal, the dredging is done, not in improving an existing waterway, but in excavating the ditch which, when completed, is to form the channel for a future waterway, it is entirely clear that the work is not done in “any river or harbor of the United States,” according to any possible interpretation of those words. I therefore answer your first question in the negative.

2. The act of February 27, 1906 (34 Stat. 27, 33), provides:

“The provisions of the act entitled ‘An act relating to the limitations of the hours of daily service of laborers and mechanics employed upon the public works of the United States and of the District of Columbia,’ approved August first, eighteen hundred and ninety-two, shall not apply to

alien laborers employed in the construction of the Isthmian Canal within the Canal Zone."

Section 4 of the act of June 30, 1906 (34 Stat. 634, 669), provides as follows:

"SEC. 4. The provisions of an act entitled 'An act relating to the limitations of the hours of daily service of laborers and mechanics employed upon the public works of the United States and of the District of Columbia,' approved August first, eighteen hundred and ninety-two, and of an act entitled 'An act making appropriations to supply urgent deficiencies in the appropriations for the fiscal year ending June thirtieth, nineteen hundred and six, and for prior years, and for other purposes,' approved February twenty-seventh, nineteen hundred and six, shall not apply to unskilled alien laborers and to the foremen and superintendents of such laborers employed in the construction of the Isthmian Canal within the Canal Zone."

In my judgment, the act of March 3, 1913, *supra*, amending the act of August 1, 1892, can not be taken to repeal the provisions of the acts of February 27, 1906, and June 30, 1906, *supra*, for the reason that they are special provisions, affecting the hours of labor of a specific class of persons, namely, in the earlier act "alien laborers" and in the later act "unskilled alien laborers" and "the foremen and superintendents of such laborers employed in the construction of the Isthmian Canal within the Canal Zone," while the recent act is general, applying to all persons employed by the United States, or by any contractor or subcontractor upon a public work of the United States or of the District of Columbia, or performing services similar to those of laborers and mechanics in connection with dredging or rock excavation in any river or harbor of the United States or of the District of Columbia. The well-settled rule of statutory construction in such a case is thus stated by the Supreme Court in *Rodgers v. United States*, 185 U. S. 83, 87:

"It is a canon of statutory construction that a later statute, general in its terms and not expressly repealing a prior special statute, will ordinarily not affect the special

provisions of such earlier statute. In other words, where there are two statutes, the earlier special and the later general—the terms of the general broad enough to include the matter provided for in the special—the fact that the one is special and the other is general creates a presumption that the special is to be considered as remaining an exception to the general, and the general will not be understood as repealing the special, unless a repeal is expressly named, or unless the provisions of the general are manifestly inconsistent with those of the special.”

The act of March 3, 1913, does not expressly repeal the provisions of the acts of February 27, 1906, and June 30, 1906. It merely amends the act of August 1, 1892, to which Congress itself had already made the special exceptions contained in the acts of February 27, 1906, and June 30, 1906. In the absence of clear evidence to the contrary, it must be presumed that in the act of March 3, 1913, Congress intended to amend the act of August 1, 1892, only to the extent provided for in the later act and to leave still effective those special exceptions to the earlier act which Congress itself had made in the acts of February 27, 1906, and June 30, 1906, and which are not repealed, nor even referred to, directly or by implication, in the act of March 3, 1913. Moreover, in the recent comprehensive eight-hour act of June 19, 1912 (37 Stat. 137, 138), Congress expressly continued in force the act of August 1, 1892, *as modified by the acts of February 27, 1906, and June 30, 1906.*

I therefore answer your second question also in the negative.

Respectfully,

WILLIAM R. HARR,
Assistant Attorney General.

Approved:

J. C. McREYNOLDS.

The SECRETARY OF WAR.

AUTHORITY TO DETERMINE CLAIMS UNDER WORKMEN'S
COMPENSATION ACT.

Final authority to determine claims arising under the workmen's compensation act of May 30, 1908 (35 Stat. 556), as amended, rests in the Secretary of Labor.

DEPARTMENT OF JUSTICE,

April 3, 1913.

SIR: I have the honor to reply to your letter dated March 12, 1913, in which you ask my opinion on the following question:

"Whether under the organic act creating your Department (act of Mar. 4, 1913, Public No. 426), the authority to make final determination of claims arising under the workmen's compensation act of May 30, 1908, and its amendments, rests in the Secretary of Labor or in the Commissioner of Labor Statistics."

I am of opinion that this final authority is in the Secretary and not in the commissioner.

The particular section requiring construction is section 3, which reads as follows:

"That the following-named offices, bureaus, divisions, and branches of the public service now and heretofore under the jurisdiction of the Department of Commerce and Labor, and all that pertains to the same, known as * * * the Bureau of Labor * * * and the Commissioner of Labor, be, and the same hereby are, transferred from the Department of Commerce and Labor to the Department of Labor, and the same shall hereafter remain under the jurisdiction and supervision of the last-named department. * * * The Bureau of Labor shall hereafter be known as the Bureau of Labor Statistics, and the Commissioner of the Bureau of Labor shall hereafter be known as the Commissioner of Labor Statistics; and all the powers and duties heretofore possessed by the Commissioner of Labor shall be retained and exercised by the Commissioner of Labor Statistics; *and the administration of the act of May thirtieth, nineteen hundred and eight, granting to certain employees of the United States the right to*

receive from it compensation for injuries sustained in the course of their employment."

The particular clause concerned, which is italicized above, was not in the original bill, but was inserted pursuant to the report of the Senate Committee on Education and Labor (62d Cong., 2d sess., S. Rept. 973). The syntax is very difficult to understand, and it may well be that, through some accident, the amendment was inserted in the wrong place. Indeed, I am unofficially informed that such was the case, and that the clause was really intended to go into the enumeration of matters transferred from the old department to the new. If that was its intention, the question you put would not arise.

However, taking the passage literally and strictly in the position in which it actually stands, and therefore as a definition of matters delegated to the Commissioner of Labor Statistics, I am still of opinion that it does not give that commissioner independent authority.

The act of May 30, 1908 (35 Stat. 556), the administration of which is the subject of the clause, was itself direct and explicit in providing (secs. 1 and 4) that the final decision of the claims arising under it should lie with the Secretary of Commerce and Labor, and it also contained (secs. 2 and 3) general provisions for the execution of the act under rules and regulations to be prescribed by him.

Unless in some way repealed, these provisions foreclose the question, for they were carried over by the organic act (secs. 6 and 8) from the Secretary of Commerce and Labor to the Secretary of Labor. Have they been repealed? Certainly not expressly, and there is nothing which could possibly effectuate a repeal by implication unless the words "administration of the act of May 30, 1908," are construed as repugnant to the continuation of the supervisory, final authority in the Secretary.

Repeals by implication are not favored and can result only from so plain a repugnancy as amounts to "irreconcilable conflict." *Petri v. Creelman Lumber Co.* (199 U. S. 487, 497). I see no such repugnancy here. Indeed,

the more natural construction of the language, taken in its context, would be that it delegates to the commissioner the sort of administrative power which is appropriate to his position, namely, power not autonomous but subordinate to the authority of the head of the department.

This view is confirmed by the provisions of the organic act itself, which in explicit terms makes all the powers of the heads of bureaus subordinate to the Secretary (sec. 6) and also transfers to the Secretary all supervisory or "appellate" authority formerly lodged in the Secretary of Commerce and Labor in reference to the subjects now delegated to the new department.

Surely if Congress had intended to constitute this particular subject an exception from this general clause or to repeal *pro tanto* the act of May 30, 1908, it would have said so in some direct way.

For these reasons I am of opinion, as above stated, that the final authority to determine these claims rests in yourself and not in the Commissioner of Labor Statistics.

Respectfully,

J. C. McREYNOLDS.

The SECRETARY OF LABOR.

APPROPRIATION AND CONTRACTS FOR MEMORIAL AMPHITHEATER AT ARLINGTON NATIONAL CEMETERY, VA.

Section 14 of the act of March 4, 1913, which created a commission to direct the construction of a memorial amphitheater at Arlington National Cemetery, Va., does not authorize any present expenditure, but it does authorize the commission to enter into contracts to the extent of the full cost of the buildings, to wit, \$750,000.

The commission should, at the proper time, submit to Congress, through the Secretary of the Treasury, an estimate of the requirements, together with a report of its action.

DEPARTMENT OF JUSTICE,

April 8, 1913.

SIR: I have the honor to reply to your letter of March 25, 1913, in which you ask my opinion upon the question raised in the following resolution by the commission

created under section 14 of the act of March 4, 1913 (Public No. 432):

"Resolved, That the secretary to the commission be, and he is hereby, instructed to submit the section under which this commission is created, to the Attorney General for his opinion as to the authority thereby vested in the commission with respect to incurring obligations to the extent of \$250,000 and incurring obligations to the extent of \$750,000, and as to its powers to contract for the whole building at the total cost of \$750,000, and as to whatever other powers the commission may have in the premises."

The said section under which the commission is created and which is referred to in the said resolution is as follows:

"Sec. 14. That for the purpose of beginning the construction under the direction of a commission consisting of the Secretary of War, the Secretary of the Navy, and Superintendent of the United States Capitol Building and Grounds, Ivory G. Kimball, representing the Grand Army of the Republic, and Charles W. Newton, representing the United Spanish War Veterans, of a memorial amphitheater, including a chapel, at the national cemetery at Arlington, Virginia, and in accordance with the plans of Carrere and Hastings, architects, of New York City, adopted by the commission heretofore appointed, there is hereby authorized the sum of \$250,000: *Provided*, That this authorization shall not be construed as fixing the limit of cost of said building at the sum herein named, but the building herein provided for shall be constructed so as to cost, complete, including heating and ventilating apparatus, and approaches, \$750,000."

I am of opinion that this section makes no present appropriation either of \$250,000 or of any amount, but it authorizes the commission to enter into contracts even to the extent of the full cost of the building, to wit, \$750,000.

Both the text and the title of the act are those not of appropriation acts, but only of "authorization" acts, for preliminary and contract purposes.

The rule as to these acts was explicitly stated by Congress in the sundry civil act of August 7, 1882 (22 Stat. 305), which contained the following proviso:

“Provided, That no act passed authorizing the Secretary of the Treasury to purchase a site and erect a public building thereon shall be held or construed to appropriate money unless the act in express language makes such appropriations.”

And this rule was made general by section 9 of the sundry civil act approved June 30, 1906 (34 Stat. 764), as follows:

“No act of Congress hereafter passed shall be construed to make an appropriation out of the Treasury of the United States, or to authorize the execution of a contract involving the payment of money in excess of appropriations made by law, unless such act shall in specific terms declare an appropriation to be made or that a contract may be executed.”

An instance of the understanding of Congress in respect to these acts was the case of the acquisition of lands for Meridian Hill Park in this city. Though expenditure for that purpose was “authorized” by the act of June 25, 1910 (36 Stat. 676), in the same way in which the \$250,000 item is “authorized” by the statute here concerned, nevertheless it was considered not appropriated for until the sundry civil act of the following year (act of Mar. 4, 1911, 36 Stat. 1289, 1310).

I am of opinion, therefore, as above stated, that while you are authorized to make contracts for the construction of the building at an ultimate cost of \$750,000, you are not authorized to make any present expenditure and that you should, at the proper time, submit to Congress, through the Secretary of the Treasury, an estimate of the requirements, together with a report of your action.

Respectfully,

J. C. McREYNOLDS.

THE SECRETARY OF WAR.

EIGHT-HOUR LAW—PUBLIC BUILDING CONTRACTS

Where Congress has fixed the limit of cost of a public building and made a partial appropriation therefor prior to June 19, 1912, but subsequent thereto has increased the limit of cost, the contract for the erection of said building, whether entered into before or after the time when said limit of cost is so increased, is excepted from the operation of section 1 of the eight-hour law of June 19, 1912 (37 Stat. 137).

DEPARTMENT OF JUSTICE,

April 19, 1913.

SIR: I have the honor to acknowledge the receipt of your letter of the 4th instant, requesting an opinion as to whether section 1 of the act of June 19, 1912 (37 Stat. 137), regulating the hours of labor on Government work, is applicable to contracts for public buildings entered into under the following circumstances:

"1. Where the limit of cost for a project, the appropriations on account of such limit (either in whole or in part) and the contract for said project were all made prior to June 19, 1912, and the limit of cost is extended subsequent to June 19, 1912, necessitating not a new contract, but a modification of the existing contract, must the stipulation prescribed by said new eight-hour law be included in such modification of the original contract?"

"2. Where the limit of cost for a project and the appropriation on account of such limit (either in whole or in part) were both made prior to June 19, 1912, but no contract was entered into, and the limit of cost is extended subsequent to June 19, 1912, and a contract is entered into under such extended limit of cost, must the stipulation prescribed by said new eight-hour law be included in such contract?"

It appears that your first question arises in the following way: The act of May 30, 1908, section 21 (35 Stat. 520, 542), authorized the construction of a post-office building at Minneapolis, Minn., and fixed the "limit of cost" at \$500,000. The act of June 25, 1910, section 21 (36 Stat. 676, 696), increased said limit by \$200,000. The acts of May 30, 1908 (35 Stat. 490), March 4, 1909 (35 Stat. 954), June 25, 1910 (36 Stat. 705), and August 24, 1912 (37 Stat.

422), appropriated a total of \$370,000 on account of the construction of said building. A contract for the construction of the building was entered into December 6, 1911. *The public building act of March 4, 1913, increased the limit of cost for the building by \$175,000.* It is therefore necessary to modify the existing contract by entering into a supplemental agreement with the contractor.

Your second question arises as follows: The act of May 30, 1908, *supra*, section 4 (35 Stat. 532), authorized the construction of a post-office building at Hillsboro, Tex., at a limit of cost of \$60,000. The acts of May 30, 1908 (35 Stat. 486), March 4, 1911 (36 Stat. 1373), and August 24, 1912 (37 Stat. 420), appropriated \$45,000 on account of said limit of cost. *The public building act of March 4, 1913, supra, increased said limit by \$10,000.* No contract has yet been let for this building.

The act of June 19, 1912, contains, at the end of section 2, the following qualification, upon the construction of which the answers to your questions depend:

“ * * * Nothing in this act shall be construed to * * * apply to contracts which have been or may be entered into under the provisions of appropriation acts approved prior to the passage of this act.”

The omnibus public buildings act of May 30, 1908, *supra*, provided, by section 34, as follows:

“SEC. 34. That hereafter in all cases where appropriations are made in part only for carrying into effect the provisions of legislation authorizing the acquisition of land for sites or for the enlargement of sites for public buildings, or for the erection or remodeling, extension, alteration, and repairs of public buildings, the Secretary of the Treasury, unless otherwise specifically directed, be, and he is hereby, authorized and empowered to enter into contracts within the full limit of cost fixed by Congress therefor.”

In the opinion rendered you on March 19 last, it was held that where the “limit of cost” of a public building has been fixed by law, and the Secretary of the Treasury has been authorized to enter into contracts up to that “limit of cost,” *prior to June 19, 1912*, but where the appropriation for the building has only been partly made prior to

that time, contracts for the erection of the building up to the "limit of cost" are excepted from the operation of section 1 of the act of June 19, 1912, although said contracts may have been entered into subsequent to the passage of that act and subsequent to January 1, 1913, when that act went into effect. This holding was based upon the provisions of section 34 of the act of May 30, 1908, *supra*, and it was considered that under that act it was the partial appropriation which gave authority to enter into the contracts up to the full limit of cost, and that, therefore, contracts entered into under such circumstances were entered into "under the provisions of appropriation acts," within the meaning of the above exception to the act of June 19, 1912.

In other words, no matter when the contract for a public building may be entered into, if a partial appropriation therefor has been made prior to June 19, 1912, and if it is that partial appropriation which, in substance, authorized the contract, then the above exception in the act of June 19, 1912, applies.

In the two questions presented by you it is assumed, and in the two cases stated by you the facts are, that the partial appropriations for the buildings were made prior to June 19, 1912. The matter is therefore reduced to this: Does the fact that subsequent to June 19, 1912, Congress has increased the limit of cost for a public building for which a partial appropriation had been made prior to June 19, 1912, transfer the authority to enter into such contract up to the full limit of cost from the partial appropriation act to the act increasing the limit of cost? In my judgment, it does not.

The authority to enter into a contract for a public building up to the full limit of cost as it may be fixed by Congress, wherever a partial appropriation for the work has been made, is conferred by section 34 of the act of May 30, 1908, without limitation as to the time when the full limit of cost shall be determined. If Congress in the first instance fixes a certain limit, and thereafter raises that limit, the authority to enter into the contract up to the higher limit is still to be found in section 34 of the act of May 30,

1908, vitalized and made operative by the partial appropriation act.

It is true that, in acts increasing the limit of cost of public buildings, Congress has expressly authorized the Secretary of the Treasury to enter into contracts for the completion of said buildings within the increased limit. Thus the act of March 4, 1913 (37 Stat. 866), by which the limit of cost of the two buildings was increased, provides:

"That to enable the Secretary of the Treasury of the United States to give effect to and execute the provisions of existing legislation authorizing the acquisition of land for sites or the enlargement thereof, and the erection, enlargement, extension, remodeling, or repair of public buildings in the several cities hereinafter enumerated, the limit of cost heretofore fixed by Congress therefor be, and the same is hereby, increased, respectively, as follows: *and the Secretary of the Treasury is hereby authorized to enter into contracts for the completion of each of said buildings within its respective limit of cost, including site: * * **"

I think, however, that such provisions were inserted merely out of abundance of caution and that they do not militate against the construction here given section 34 of the act of May 30, 1908. No good reason is perceived why said act should be so construed as to limit the authority of the Secretary of the Treasury to enter into contracts for the purposes stated to the first limit of cost fixed by Congress and which it has thereafter seen fit to change.

I therefore answer both of your questions in the negative.

Respectfully,

WILLIAM R. HARR,
Assistant Attorney General.

Approved:

J. C. McREYNOLDS.

The SECRETARY OF THE TREASURY.

LEASE OF WATER POWER CREATED BY LOCK AND DAM ON
BLACK WARRIOR RIVER, ALA.

The Secretary of War has no right without express authority from Congress to enter into an agreement for the lease of the water power created by a Government lock and dam on the Black Warrior River, Ala.

DEPARTMENT OF JUSTICE,

April 21, 1913.

SIR: I have the honor to acknowledge the receipt of the letter of your predecessor, Mr. Stimson, of February 17 last, requesting an opinion as to his right to enter into an agreement for the lease of water power incidentally created by a Government lock and dam on the Black Warrior River, Ala., known as Lock and Dam No. 17, under the authority of the act of August 22, 1911 (37 Stat. 32), or any other existing legislation.

Assuming that the Federal Government has the right to dispose of surplus water created by a dam erected by it in improving the navigation of one of the navigable waters of the United States within a State (*Kaukauna Co. v. Green Bay, &c., Canal*, 142 U. S. 254, 272-273; *Green Bay, &c., Canal v. Patten Paper Co.*, 172 U. S. 58; *same case*, 173 U. S. 179), it is manifest that under the Constitution (Art. IV, sec. 3) such right of disposal resides solely in Congress and can not be exercised by an executive officer without authority from that body.

I have examined the statutes referred to by Mr. Stimson, namely:

1. The act of August 22, 1911, *supra*;
2. Section 14 of the river and harbor act of March 3, 1899 (30 Stat. 1121, 1152);
3. The act of February 15, 1901 (31 Stat. 790), taken in connection with the act of July 28, 1892 (27 Stat. 321);
4. The Agricultural Department appropriation act of March 4, 1911 (36 Stat. 1253, 1254), dealing with the "Improvement of the national forests"—

and I find nothing in any of said acts which would authorize the Secretary of War to enter into an agreement for the lease of water power.

1. The act of August 22, 1911, *supra*, not only contains no such authority, but, as stated in the letter of Mr. Stimson, the act as originally introduced contained sections authorizing the Secretary of War to enter into an agreement for the sale of water power created at the lock and dam on the Black Warrior River, and those sections were subsequently stricken out by Congress.

2. Section 14 of the act of March 3, 1899, *supra*, authorizes the Secretary of War to grant permission for the temporary occupation or use of any sea wall, bulkhead, jetty, dike, levee, wharf, pier, or other work built by the United States, or any piece of plant, floating or otherwise, used in the construction of any such sea wall, etc. Whatever may be the nature of the right to the surplus water created by a dam, whether it be in the nature of a property right or not, it is clear that it is not included either specifically or by implication within the language of section 14 of the act of March 3, 1899.

Mr. Stimson's letter inclosed a list of the kind of rights and the kind of interests which have been disposed of under the authority of this section. I have examined this list, and the only instances I discover where a lease of water power has been made is at the Muskingum River improvement, Ohio, and at Green River, Ky. The leases of water power on the Muskingum River were expressly authorized by the act of August 11, 1888 (25 Stat. 400, 417). The leases of water power on the Green River, Ky., were expressly authorized by the act of September 19, 1890 (26 Stat. 426, 447). The departmental construction, therefore, of section 14 of the act of March 3, 1899, is against the implication of any right derived from said section to lease water power.

In addition, Congress has in a number of cases, as in the cases of the Muskingum and Green Rivers noted above, expressly authorized the leasing of water power when it thought proper so to do, as appears from a list contained in Senate Document No. 57, Sixty-second Congress, first session.

3. The act of July 28, 1892, *supra*, authorizes the Secretary of War to lease, for a period not exceeding five years

and revocable at any time, such property of the United States under his control as may not for the time be required for public use and for the leasing of which there is no authority under existing law. I do not think this was intended to include water power belonging to the Government, even regarding it as a property right and the statute as applying to such rights, because there is no act of Congress placing such power generally under the control of the Secretary of War, and, as above pointed out, the lease of water power has always been authorized by specific act of Congress, and in the act of August 22, 1911, Congress expressly refrained from authorizing the Secretary of War to dispose of the particular water power here in question.

Moreover, the act of July 28, 1892, *supra*, was passed merely for the purpose of giving the Secretary of War power over the property of the Government in his control similar to the power vested in the Secretary of the Treasury by the act of March 3, 1879, section 1 (20 Stat. 383) (S. Rept. No. 171, 52d Cong., 1st sess.). Said act of March 3, 1879, merely gave the Secretary of the Treasury authority to lease at his discretion for a period not exceeding five years "such unoccupied and unproductive property of the United States under his control for the leasing of which there is no authority under existing law" and provided that such leases should be reported annually to Congress. It is entirely clear, in my judgment, that neither of these statutes was intended to apply to the right to use the surplus water created by a dam in a navigable water of the United States.

The act of February 15, 1901, *supra*, applies to the Secretary of the Interior and confers no authority in any respect upon the Secretary of War.

4. The Agricultural Department appropriation act of March 4, 1911, *supra*, merely authorizes the grant of easements for rights of way "for electrical poles and lines for the transmission and distribution of electrical power, and for poles and lines for telephone and telegraph purposes," and evidently, therefore, has no application at all to the

water power created by the dam on the Black Warrior River.

For the reasons briefly stated I am of the opinion that the Secretary of War has no right to enter into an agreement for the lease of the water power created by the dam on the Black Warrior River.

Respectfully,

WILLIAM R. HARR,
Assistant Attorney General.

Approved:

J. C. McREYNOLDS.

The SECRETARY OF WAR.

POSTAL SERVICE—EMPLOYMENT OF TEMPORARY AND
AUXILIARY CLERKS AND LETTER CARRIERS.

The authority of the Postmaster General to employ temporary and auxiliary clerks and substitute, auxiliary and temporary letter carriers is dependent entirely upon the appropriations made by Congress for that purpose, and hence he would not be justified in incurring a deficiency in respect to their employment.

DEPARTMENT OF JUSTICE,

May 6, 1913.

SIR: I beg to acknowledge the receipt of your letter of the 3d instant, asking to be advised whether, under the circumstances hereinafter stated, you would be justified in incurring a deficiency in respect to the employment of temporary and auxiliary clerks and substitute, auxiliary, and temporary letter carriers.

Section 5 of the act of August 24, 1912, making appropriations for the service of the Post Office Department for the fiscal year ending June 30, 1913, chapter 389 (37 Stat. 539), provides:

“SEC. 5. That on and after March fourth, nineteen hundred and thirteen, letter carriers in the City Delivery Service and clerks in first and second class post offices shall be required to work not more than eight hours a day: *Provided*, That the eight hours of service shall not extend over a longer period than ten consecutive hours, and the

schedules of duty of the employees shall be regulated accordingly.

* * * *

“That should the needs of the service require the employment on Sunday of letter carriers in the City Delivery Service and clerks in first and second class post offices, the employees who are required and ordered to perform Sunday work shall be allowed compensatory time on one of the six days following the Sunday on which they perform such service.”

Section 8 of the same act makes provision for the parcel-post service. It provides that fourth-class mail matter shall embrace all other matter, including farm and factory products, not embraced by law in either the first, second, or third class and not exceeding a certain weight or size, etc., and establishes postal zones, fixes delivery rates of postage, etc. That section further provides:

“That the Postmaster General shall provide such special equipment, maps, stamps, directories, and printed instructions as may be necessary for the administration of this section; and for the purposes of this section, and to supplement existing appropriations, including the hiring of teams and drivers, there is hereby appropriated, out of any money in the Treasury not otherwise appropriated, the sum of seven hundred and fifty thousand dollars.”

The act in question also contains the following provisions (37 Stat. 544, 545):

“For temporary and auxiliary clerk hire at first and second class post offices and temporary and auxiliary clerk hire at summer and winter resort post offices, eight hundred and fifty thousand dollars.

* * * *

“For pay of substitutes for letter carriers absent with pay, and of auxiliary and temporary letter carriers at offices where city delivery is already established, one million six hundred thousand dollars.”

Referring to these provisions you say:

“For the purpose of administering section 5 the estimate for temporary and auxiliary clerk hire for the year 1913 submitted by the Post Office Department was in-

creased \$500,000 and for auxiliary and temporary carriers \$400,000, but no other increases were provided for this purpose.

"No increase was made in these appropriations for administering section 8. However, the appropriation for auxiliary and temporary carriers was supplemented by an allotment of \$200,000 from the appropriation of \$750,000 allowed for parcel post in the general deficiency act for 1913. The increase of \$500,000 for temporary and auxiliary clerk hire to administer section 5 is not sufficient, as it has already required \$474,470 and 754 additional clerks. In addition to this amount it was necessary to expend during the quarter ended March 31 from the appropriation for temporary and auxiliary clerk hire approximately \$200,000 to administer section 8 and it is estimated that a like amount will be necessary for this purpose for the quarter ending June 30, 1913. The requests already received at the department amount to \$117,451, which can not be allowed because of the exhausted appropriation.

"The appropriation for auxiliary carriers is also exhausted. The estimates of postmasters made as of April 1, 1913, covering the additional cost of the service because of the new eight-hour law and the parcel post will require \$300,000 to meet ordinary demands until June 30 next.

"It is therefore apparent that under the requirements of sections 5 and 8 it will be necessary for me to incur a deficiency in the appropriations for temporary and auxiliary clerks and substitute, auxiliary and temporary carriers or seriously cripple the service. It is desired to secure your opinion whether, under the circumstances, I am justified in incurring such deficiency."

Section 3679 of the Revised Statutes, as amended by the acts of March 3, 1905 (33 Stat. 1257), and February 27, 1906 (34 Stat. 48, 49), provides:

"SEC. 3679. No executive department or other Government establishment of the United States shall expend, in any one fiscal year, any sum in excess of appropriations made by Congress for that fiscal year, or involve the Government in any contract or other obligation for the future payment of money in excess of such appropriations unless

such contract or obligation is authorized by law. Nor shall any Department or any officer of the Government accept voluntary service for the Government or employ personal service in excess of that authorized by law, except in cases of sudden emergency involving the loss of human life or the destruction of property. All appropriations made for contingent expenses or other general purposes, except appropriations made in fulfillment of contract obligations expressly authorized by law, or for objects required or authorized by law without reference to the amounts annually appropriated therefor, shall, on or before the beginning of each fiscal year, be so apportioned by monthly or other allotments as to prevent expenditures in one portion of the year which may necessitate deficiency or additional appropriations to complete the service of the fiscal year for which said appropriations are made; and all such apportionments shall be adhered to and shall not be waived or modified except upon the happening of some extraordinary emergency or unusual circumstance which could not be anticipated at the time of making such apportionment, but this provision shall not apply to the contingent appropriations of the Senate or House of Representatives; and in case said apportionments are waived or modified as herein provided, the same shall be waived or modified in writing by the head of such Executive Department or other Government establishment having control of the expenditure, and the reasons therefor shall be fully set forth in each particular case and communicated to Congress in connection with estimates for any additional appropriations required on account thereof. Any person violating any provision of this section shall be summarily removed from office and may also be punished by a fine of not less than one hundred dollars or by imprisonment for not less than one month."

In my judgment, this statute forbids your incurring any deficiency in the respects mentioned. Your authority to employ temporary and auxiliary clerks and substitute, auxiliary, and temporary letter carriers during the fiscal year 1913 appears to be dependent entirely upon the appropriations for that purpose, and is not otherwise author-

ized by law. The fact that such appropriations are inadequate by reason of the change in the hours of service of letter carriers and clerks, or by reason of the establishment of the parcel post, as provided in sections 5 and 8 of the act of August 24, 1912, is not sufficient to authorize you to exceed the appropriations. Congress itself has determined the increased necessities of the service in the respects stated due to the changes referred to. If the appropriations therefor are not sufficient, the responsibility rests with it.

It is also to be observed that under section 3679, Revised Statutes, as amended, it is incumbent upon you to apportion the appropriations so as to avoid a deficiency, and the mere fact that the appropriations are insufficient, in your judgment, adequately to subserve the public interests is not "an extraordinary emergency or unusual circumstance which could not be anticipated at the time of making such apportionment" within the meaning of section 3679, as amended. (See 4 Op. Asst. Gen. for the Post Office Dept., p. 632, where the history of the amendments to section 3679 is set forth.)

In addition, it is to be observed that section 14 of the act of August 24, 1912, *supra*, provides:

"SEC. 14. That the Postmaster General may expend for the service of the Post Office Department during the months of July and August, nineteen hundred and twelve, a greater amount than that provided for by the joint resolutions extending appropriations for the necessary operations of the Government under certain contingencies, approved July first, August first, and August fifteenth, nineteen hundred and twelve: *Provided*, That the total expenditures under this act for the whole of the fiscal year nineteen hundred and thirteen shall not exceed the amounts hereby appropriated."

This is an express limitation of the total expenditures under the authority of this act for the whole fiscal year 1913 to the amounts thereby appropriated, and must be held to include the temporary and auxiliary service covered thereby.

It is true that sections 3965, 3968, and 3975 of the Revised Statutes contain general provisions authorizing the Postmaster General to contract for the carrying of the mails; but these statutes do nothing more than prescribe the general duties of the Postmaster General (*Beach v. United States*, 226 U. S. 243, 257) and must yield to the specific provisions of the act of August 24, 1912, with regard to the employment of temporary, auxiliary, and substitute service, as well as to the express prohibitions against exceeding appropriations contained in that act and in section 3679 of the Revised Statutes, as amended.

Respectfully,

WILLIAM R. HARR,
Assistant Attorney General.

Approved.

J. C. McREYNOLDS.
To the POSTMASTER GENERAL.

POSTAL SAVINGS SYSTEM—EMERGENCY CREDIT.

The practice of excluding the emergency credit from the regular quota of funds assigned to a postal savings depository is not in conflict with the provision of section 9 of the postal savings act of June 25, 1910 (36 Stat. 816), which requires that such funds shall be deposited substantially in proportion to the capital and surplus of each bank.

DEPARTMENT OF JUSTICE,
May 17, 1913.

SIR: I have the honor to acknowledge the receipt of your letter of the 8th instant, requesting an opinion whether a certain arrangement, as to the handling of postal savings funds, is consistent with the provision of section 9 of the postal savings act of June 25, 1910 (36 Stat. 816), that such funds shall be deposited in the banks of the community where they are received "substantially in proportion to the capital and surplus of each such bank."

From your statement it appears that, in order to meet withdrawals, it is necessary for the postmaster to have in

one of the qualified depository banks in each community an emergency credit subject to his check, which credit averages at the present time 6 per cent only of the total deposits and is liable to decrease. Since this emergency credit, equally with the other postal savings deposits, must be secured by bonds, although it is an active account and entails much labor and accounting on the part of the bank, it has seemed equitable, and it has been the practice, as evidenced by regulation 9 of the regulations of the board of trustees of 1911, to exclude this emergency credit from the proportionate share in postal savings deposits of the bank allowing it; and the question is whether this practice is in conflict with the provision above quoted requiring that the deposits shall be "substantially in proportion" to the capital and surplus of each bank.

The practical administration of the postal savings act is largely left to the board of trustees. They have power "to make all necessary and proper regulations for the receipt, transmittal, *custody*, *deposit*, investment, and *re-payment* of the funds deposited at postal savings depository offices" (act of June 25, 1910, sec. 1). The Postmaster General, with the approval of said board, is authorized "to promulgate, and from time to time modify or revoke * * * such rules and regulations not in conflict with law as he may deem necessary to carry the provisions of this act into effect" (*ibid.*, sec. 14). The matter of making the deposits in qualifying banks "substantially in proportion" to their capital and surplus is clearly subject to regulation by the board of trustees, provided the regulation be reasonable, nondiscriminative, and adapted to carry out the purposes of the act. The object of this provision in the act was to insure that the banks shall be treated fairly as between each other, without favoritism or injustice. To give the bank which assumes the burden of the emergency credit of the postmaster an added deposit equivalent thereto can not be considered unfair or "substantially" disproportionate, at any rate to the extent of being beyond the fair discretion of the trustees in exercising their power to make regulations to carry the provisions of the act into effect.

In my judgment, therefore, the practice referred to is not in conflict with the provisions of the act.

Respectfully,

WILLIAM R. HARR,
Assistant Attorney General.

Approved:

J. C. McREYNOLDS.

To the POSTMASTER GENERAL.

APPLICATION OF THE FOOD AND DRUGS ACT TO MEATS
AND MEAT-FOOD PRODUCTS.

Meats and meat-food products prepared for interstate or foreign commerce under the meat-inspection law of June 30, 1906 (34 Stat. 674), are subject to the provisions of the food and drugs act of June 30, 1906 (34 Stat. 768).

DEPARTMENT OF JUSTICE,
May 24, 1913.

SIR: I have your letter of the 3d instant requesting my opinion on the following question:

“Are the provisions of the Food and Drugs Act, June 30, 1906 (34 Stat. 768), applicable to meats and meat-food products prepared for interstate or foreign commerce under the meat-inspection law, June 30, 1906 (34 Stat. 674)?”

The question arises in your department by reason of the fact that Rule 39 of the Rules and Regulations made by the Secretaries of the Treasury, Agriculture, and of Commerce and Labor for the enforcement of the Food and Drugs Act provides that said regulations shall not apply to domestic meats and meat-food products which are prepared under the meat-inspection law, and that it is your intention, if your question shall be answered in the affirmative, to propose to the other Secretaries that said Rule 39 be revoked.

I have carefully examined the opinion of the Solicitor of the Department of Agriculture, which you inclose for my information, and I agree with him that your question should be answered affirmatively.

The agricultural appropriation act of June 30, 1906, contains some 22 paragraphs, which are commonly called the meat-inspection amendment. These paragraphs begin:

"That for the purpose of preventing the use in interstate or foreign commerce, as hereinafter provided, of meat and meat-food products which are unsound, unhealthful, unwholesome, or otherwise unfit for human food, etc."

On the same day was approved another statute which is popularly known as the Food and Drugs Act.

Both statutes had the common purpose of preventing the shipment in interstate and foreign commerce of impure or unwholesome foods.

The first act is limited to meats and meat-food products, while the second act is general and covers all foods and drugs. While they have a common object, their method of accomplishing that purpose is quite different.

The consensus of opinion among scientists is that it is practically impossible to judge by an examination of a piece of meat, whether or not it came from a diseased animal, but that such fact can only be determined by a post-mortem examination of the carcass of the animal itself. Accordingly, the meat-inspection act prohibits the interstate transportation of meat, unless there has been a post-mortem examination of the animals from which such meat comes and a finding by the official inspectors that the animals were free from disease, and the meat is sound, healthful, wholesome, and fit for human food. The whole structure of this statute is addressed to securing an inspection of the animal from the time it enters the slaughterhouse practically until the meat-food products reach the hands of the retailer, and this purpose is accomplished by forbidding and making criminal the interstate transportation of all meat which does not bear the Federal mark of inspection and approval. So far as this statute is concerned, the prerequisite of the lawful transportation of the meat is the Federal inspection and approval, and the crime exists even though the meat transported be perfectly sound and wholesome, if it has not in fact been inspected and approved.

The act applies only to cattle, sheep, swine, and goats, and poultry is not inspected under it; it is enforced only by criminal action; it does not provide for the seizure of the meats themselves, nor does it reach meats which have become spoiled after leaving an official establishment, but which are still in interstate commerce.

The Food and Drugs Act, on the other hand, accomplishes its purpose, not by an inspection preliminary to transportation—for inasmuch as the act applies generally to all foods and drugs, such inspection would be practically impossible—but by making criminal the interstate commerce in adulterated or misbranded foods and drugs. Provision is made for collecting and analyzing samples of foods and drugs, and in addition to punishing violators of the law authority is given to seize and destroy the adulterated or misbranded foods themselves.

While these two statutes overlap to some extent, neither is inconsistent with the other, nor is anything contained in them to indicate that either was intended by Congress as a substitute for the other. I am of the opinion that the acts are supplementary to each other, and that both apply to the same articles of food wherever their language so indicates.

That the Food and Drugs Act applies to meats and meat-food products is clear from its language. For instance, in section 6, it is said:

“The term ‘food’, as used herein, shall include all articles used for food, drink, confectionery, or condiment by man or other animals, whether simple, mixed, or compound.”

Section 7 provides that, for the purposes of the act, an article shall be deemed to be adulterated, in the case of food:

“Sixth. If it consists in whole or in part of a filthy, decomposed, or putrid animal or vegetable substance, or any portion of an animal unfit for food, whether manufactured or not, or if it is the product of a diseased animal, or one that has died otherwise than by slaughter.”

Respectfully,

J. C. McREYNOLDS.

TO THE SECRETARY OF AGRICULTURE.

REDUCTION OF COMPENSATION OF HONORABLY DIS-
CHARGED SOLDIERS AND SAILORS.

The proviso of section 4 of the act of August 23, 1912 (37 Stat. 413), relating to the reduction in rank and salary of honorably discharged soldiers and sailors, does not prohibit the head of a department from conforming the salary of such employees to the grade or character of work they may be called upon to perform.

DEPARTMENT OF JUSTICE,

June 2, 1913.

SIR: I beg to acknowledge the receipt of your letter of the 12th ultimo, requesting an opinion whether you have authority to reduce the compensation of certain employees in your department who are honorably discharged soldiers or sailors, "engaged in work of a grade or character which does not, in the department's opinion, justify the compensation they are receiving, notwithstanding that the work may be done in an efficient manner."

In this connection you call my attention to section 4 of the legislative, executive, and judicial appropriation act, approved August 23, 1912 (37 Stat. 413), which reads as follows:

"SEC. 4. The Civil Service Commission shall, subject to the approval of the President, establish a system of efficiency ratings for the classified service in the several executive departments in the District of Columbia based upon records kept in each department and independent establishment with such frequency as to make them as nearly as possible records of fact. Such system shall provide a minimum rating of efficiency which must be attained by an employee before he may be promoted; it shall also provide a rating below which no employee may fall without being demoted; it shall further provide for a rating below which no employee may fall without being dismissed for inefficiency. All promotions, demotions, or dismissals shall be governed by provisions of the civil service rules. Copies of all records of efficiency shall be furnished by the departments and independent establishments to the Civil Service Commission for record in accordance with the provisions of this section: *Provided*,

1668 *Honorably Discharged Soldiers and Sailors.*

That in the event of reductions being made in the force in any of the executive departments no honorably discharged soldier or sailor whose record in said department is rated good shall be discharged or dropped, or reduced in rank or salary.

"Any person knowingly violating the provisions of this section shall be summarily removed from office, and may also upon conviction thereof be punished by a fine of not more than one thousand dollars or by imprisonment for not more than one year."

It appears that the Solicitor of the then Department of Commerce and Labor, in an opinion rendered November 9, 1912, advised the Secretary that the reduction of the compensation of the class of employees in question was prohibited by the proviso of the section just quoted. Because of this opinion, you say, "the department has refrained from reducing the compensation of any honorably discharged soldier or sailor whose efficiency rating in the department has been good, notwithstanding its belief, in several instances, that such reduction would be in the interest of good administration."

Recently, however, the Solicitor of the Treasury, in an opinion to the Secretary of the Treasury, took a different view, holding that the proviso in question was dependent, first, upon a reduction being made in the force of a department, and secondly, upon the establishment, by the Civil Service Commission, of the system of efficiency ratings provided for in the preceding part of the section, which system has not yet been established.

In view of this conflict of opinion, you have submitted the matter for my views.

Assuming, for the purposes of your question, that the proviso as to honorably discharged soldiers and sailors is not dependent for its operation upon the establishment of the system of efficiency ratings provided for in the preceding part of the section, I am nevertheless of the opinion that it has no application to the situation referred to in your letter. The proviso only undertakes to protect honorably discharged soldiers or sailors, whose departmental record is good, from being discharged or

dropped, or reduced in rank or salary, "in the event of reductions being made in the force in any of the executive departments." It says, in substance, that any such reduction in the force of a department shall not be at the expense of any honorably discharged soldier or sailor, if his record in said department be good. But it does not prohibit the head of a department from conforming the salary of an honorably discharged soldier or sailor to the grade or character of work he may be called upon to perform.

Respectfully,

J. C. McREYNOLDS.

To the SECRETARY OF COMMERCE.

CIVIL SERVICE—CORRECTION OF CERTIFICATION AFTER APPOINTMENT.

The Civil Service Commission may, at any time prior to appointment, correct a mistake in its certification, but after an appointment has been made and has been accepted by the appointee, without any fraud on his part or concealment of material facts, and the matter involved is not jurisdictional, it is then too late for the commission to attempt to correct its certification.

DEPARTMENT OF JUSTICE,

June 5, 1913.

SIR: In accordance with your request of the 3d instant, I beg to submit an opinion upon the following matter presented by the Civil Service Commission.

Section 9 of the civil service act (22 Stat. 403) provides:

"That whenever there are already two or more members of a family in the public service in the grades covered by this act, no other member of such family shall be eligible to appointment to any of said grades."

In its letter to you the commission states:

"Fred L. Mostyn, whose name appeared on the register for apprentice plate printer, indicated in his application prior to examination that there were already two members of his family in the service under circumstances which should have precluded his certification so long as they existed. In approving the application, however, this fact

was overlooked and he was duly certified and appointed as junior lock fitter in the mail bag repair shop, Post Office Department. The fact that he was not eligible on account of the disability under section 9 of the civil service act was not discovered in this office until receipt of Mr. Mostyn's declaration made in the usual form when he entered upon duty.

* * * * *

"The Post Office Department was requested to remove Mr. Mostyn but it was also advised that in the event of refusal to do so the matter might be submitted to the Attorney General for opinion. The Department in letter of May 24 stated that Mr. Mostyn had given complete satisfaction and in view of the difficulty the Department has experienced in securing suitable eligibles for the position of junior lock fitter it is not believed to be in the interest of the service to drop him from the rolls unless, in the opinion of the Attorney General, such action is deemed necessary."

The commission desires to be advised whether the case presented is controlled by the opinions of Attorney General Harmon, reported in 21 Op. 289 and 335; and if not, whether Mr. Mostyn's appointment is illegal and he should be removed.

In the first opinion it was held that an irregularity in the certification of the name of an eligible for appointment in the civil service was cured by the probational and absolute appointment of such person. The irregularity in that case consisted in the certification of the name of a person who was sixth on the eligible list, such certification being contrary to the civil service rules. In his opinion Mr. Harmon said (21 Op. 290-291):

"There must be some point of time when the mere irregularities in certification must be regarded as cured. The civil service rules have no greater dignity than the law which authorizes them, and it would be highly unreasonable that persons who have left other employments should be ousted from positions which they are satisfactorily filling simply because it is discovered that employees

of the Civil Service Commission have made mistakes in their certifications. To hold that the irregularity in the present case has been cured by the probational and absolute appointments of Mr. Moore and by his long service is in line with the decisions of the courts upon cognate questions, and with the opinion of Attorney General Miller in 20 Opinions, 274, in which it was held that an appointment made contrary to the rule of apportionment enjoined by the statute should not be disturbed because the violation of the rule had been due to mere inadvertence, though the fault was that of the appointee in failing to give notice of a change of residence which occurred between his examination and his appointment. I therefore answer that the appointment should now be considered conclusive."

In the other opinion referred to, Mr. Harmon held that the certificate of eligibles delivered to the appointing officer by the subordinates of the Civil Service Commission was complete authority to such officer and complete protection to the appointee. That case was also one of the certification of a person whose position on the eligible list did not entitle him thereto, and in deciding it Mr. Harmon said (21 Op. 335-336):

"This case is similar to that of Frank C. Moore, discussed in my opinion of January 9, 1896, except that in Moore's case the irregularity was not discovered until he had served over six months and received an absolute as well as probationary appointment. In my opinion, however, this distinction is not material. The appointing officer must necessarily place absolute reliance upon the certificate received by him from the board of examiners. The appointment is usually made promptly, and the appointee often gives up other employment so that it would be a great injustice to him to be thrown out of his new place in the Government service on account of a mistake made by some subordinate of the Civil Service Commission.

"I think that the regularity of the steps taken by the Civil Service Commission is not jurisdictional; and that, while the subordinates of that commission are subject to discipline for such misfeasances as occurred in the present

case, nevertheless the certificate which they deliver to the appointing officer is a complete authority to the latter and a complete protection to the appointee.

"Answering the first question submitted, therefore, it is my opinion that Baggott's appointment was legal. This disposes also of the second question.

"Answering the third question, as to whether there is 'any law or rule which will be effective in preventing a board from securing the appointment of a person who is ineligible or who has never been examined by simply entering his name on the certificate,' I know of no method except the selection of competent and careful boards of examiners. Doubtless every effort to this end has been made by the Civil Service Commission; and this case, therefore, must be classed among the mistakes that occasionally and unavoidably occur in all business affairs.
* * *

The Civil Service Commission calls attention to the fact that the case now under consideration differs from those in the opinions just cited in that the inadvertent certification of Mostyn's name was contrary to the civil service act, and not simply to a rule promulgated thereunder. In my opinion this is immaterial. The rules promulgated by the President under the authority of the civil service act have the force of law, and, while they may be waived by the President himself, can not be disregarded by the commission or the head of a department any more than a provision of the statute itself.

The provision in question declares that a person shall be ineligible for appointment to any of the grades covered by the act if there are already two or more members of his family in the public service in those grades; but it does not declare that the appointment of such a person shall be void and of no effect.

Under the civil service act and rules, the head of a department is required to accept the determination of the Civil Service Commission as to eligibility of an applicant for appointment (28 Op. 393-394). If the commission makes a mistake in its certification, it is, of course, within its power to correct it before appointment; but after an

appointment is made by the head of a department and is accepted by the appointee, without and fraud on his part or concealment of material facts, I think it is too late for the commission to attempt to correct its certification.

The rule, of course, would be otherwise if the matter involved were jurisdictional; but I agree with Attorney General Harmon that "the regularity of the steps taken by the Civil Service Commission is not jurisdictional." (See *Noble v. Union River Logging Railroad*, 147 U. S. 165, 173-174.)

Respectfully,

J. C. McREYNOLDS.

To the PRESIDENT.

NATIONAL BANKS—MEANING OF WORD "PLACE."

The word "place," as used in section 5138 of the Revised Statutes, relating to the capitalization of national banks, means a corporate or quasicorporate body organized for the purpose of local government in a defined territory.

DEPARTMENT OF JUSTICE,

June 6, 1913.

SIR: I have the honor to acknowledge the receipt of your letter of March 25 last, requesting an opinion as to the meaning of the word "place" in section 5138 of the Revised Statutes relating to the capitalization of national banks.

The occasion is a request for your permission to organize a banking association with a capital of \$50,000, to do business in Logan Square, a locality within the limits of the corporate city of Chicago, but about 9 miles removed from its business district and large center of population.

The answer to your question turns entirely upon the proper construction of sections 6 and 7 of the act of June 3, 1864 (13 Stat. 99, 101), section 5138, Revised Statutes, being the same, in so far as the point involved is concerned, as section 7 of the act of June 3, 1864.

Section 6 of the said act requires an organization certificate for national banks which shall specify "the place

where the operations of discount and deposit are to be carried on, designating the State, Territory, or district, and also the particular *county and city, town or village.*"

Section 7 of the said act provides that no association shall be organized with a less capital than \$100,000, "*nor in a city* whose population exceeds fifty thousand persons, with a less capital than two hundred thousand dollars; provided that banks with a capital of not less than fifty thousand dollars may, with the approval of the Secretary of the Treasury, be organized *in any place the population of which does not exceed six thousand inhabitants.*"

It is quite evident that the "place" referred to in section 7 is the same "place" referred to in section 6, and by the settled rule of statutory construction must have the same meaning. It is equally certain that the "place" in section 6 must be a "city, town, or village." The language can have no other meaning. If "place" can mean something other than "city, town, or village," then, of course, it would be impossible to make the designation required.

It follows that "place" in section 7 must mean "city, town, or village," and, in order to establish a bank with \$50,000 capital, it must be established in a "city, town, or village" "the population of which does not exceed six thousand inhabitants."

The words "city, town, or village" can have no other *legal meaning* (except possibly in very anomalous cases), than a corporate or quasicorporate body organized *for the purpose of local government in a defined territory.* This was the established meaning of these words at the time the act of 1864 was passed, and is their meaning to-day. It is well understood that the State, itself a governmental corporation, subdivided itself into counties, and in some cases townships, or hundreds, which latter were quasicorporations exercising a portion of the governmental authority of the State, while, where population became too dense for this form of government, villages, towns, and cities were organized, and they were organized essentially as corporations, to conduct, as such, the local government of

a defined community. No one ever supposed that "city, town, or village" was merely a popular appellation given to a certain vaguely defined territory. The words connoted, above all, local government, with legislative and executive functions. (Dillon on Municipal Corporations, 5th ed., sec 14, 15, et seq.; Cooley on Constitutional Limitations, 7th ed., pp. 261, 262, et seq.; Goodnow Principles of Administrative Law, pp. 206, 219, et seq.)

That this is the meaning of the word "place" in the act of 1864 is brought out clearly in the proviso to section 41 thereof, to the effect that nothing in the act shall be construed to prevent the shares in any banking association held by any person or body corporate "from being included in the valuation of the personal property of such person or corporation in the assessment of taxes imposed by or under State authority at the place where such bank is located, and not elsewhere."

The word "place" is evidently used here as meaning a community where personal property is valued for taxation, and evidently such a valuation can be, and is only, made in some *political* subdivision. A mere locality has, as such, no special valuation of personal property for taxation.

This reasoning applies a fortiori to the word "city." In all the history of England and of this country this word has always primarily indicated government, not territory, and a citizen was one who claimed the right to participate in this local government. The "city" of New York, or the "city" of Chicago, includes all that territory in which the laws and ordinances of the city run, and its power of local taxation is exercised, and, except in loose, popular usage, can include no less. The inhabitants of Logan Square live in the "city" of Chicago, are subject to its laws and taxing power, and are citizens thereof. It is the population of the "city" of Chicago, as thus defined, which must be taken as a basis for the capitalization of any banking association established within its corporate limits.

The act of 1864 could not be safely administered under any other construction, for it would be impossible to de-

termine the population of a "city, town, or village," unless its boundaries as a political community be taken as a base. The act of 1864 must have had in mind the United States Census, which could not be resorted to if the loose definition of a "city, town, or village" be taken.

Moreover, the loose construction of these words leaves the administration of the act in an important feature to the uncontrolled discretion of the administrative officers. Once the test of a political community is abandoned and there is no clear principle upon which to define a "city, town, or village," the whole question would finally come down to the mere opinion of the administrative officer that a bank with not less than \$50,000 capital was, or was not, proper or necessary in a particular locality.

It is true that the act has received a different construction by the Solicitors of the Treasury, and that this construction has been acted upon by your department since 1901. This departmental construction is entitled to considerable weight, and might be decisive if the law were ambiguous, but as, in my opinion, the law is entirely clear, the departmental construction, while entitled to consideration, is not controlling and, in this case, should not be followed. (*Swift Co. v. U. S.* 105 U. S. 691, 695; *U. S. v. Graham*, 110 U. S. 219, 221; *Studebaker v. Perry*, 184 U. S. 258, 269.) It is also true that the construction I have adopted may work an inconvenience in a very few, peculiar cases, but, in my judgment, the remedy, if any remedy be needed, should be left to Congress, where the matter properly belongs.

Very respectfully,

J. C. McREYNOLDS.

TO THE SECRETARY OF THE TREASURY.

PROMOTION OF ARMY OFFICERS.

The act of October 1, 1890 (26 Stat. 562), regulating the promotion of certain officers of the Army, does not make it obligatory upon the President to promote to a vacancy existing in the grade of lieutenant colonel the senior officer in the next lower grade, if, in his opinion, the record of the officer has been such as to indicate that he is disqualified for promotion.

DEPARTMENT OF JUSTICE,

June 23, 1913.

SIR: I have the honor to reply to the request in your letter of June 5 for my opinion concerning the effect of the act of Congress of October 1, 1890, upon your right to make nominations for certain positions in the Army. It appears that a vacancy exists in the grade of lieutenant colonel in the Quartermaster Corps, and that you are considering how it should be filled.

The following queries, presented by the honorable Secretary of War, state the points for consideration:

"(1) Whether the provision of the act of October 1, 1890, that promotions in the Army below the rank of brigadier general shall, subject to the examination required therein (i. e., 'examination of all officers of the Army below the rank of major'), be made 'according to seniority in the next lower grade,' should be construed as mandatory upon the President to appoint the senior officer in the grade of major to the vacancy, if, in his opinion, the record of the officer has been such as to indicate that he is disqualified for promotion, but under the law can not be eliminated, either through the agency of a retiring board or a court-martial.

"(2) Whether, if the act of October 1, 1890, be regarded as intended to require the President to appoint the senior officer in the next lower grade, the statute if so construed would not be an unauthorized encroachment upon the appointing power of the President and should not for that reason be treated as advisory or recommendatory in character."

The act of October 1, 1890, c 1241 (26 Stat. 562), which is referred to in the above questions, provides:

"Be it enacted, etc., That hereafter promotion to every grade in the Army below the rank of brigadier general, throughout each arm, corps, or department of the service, shall, subject to the examination hereinafter provided for, be made according to seniority in the next lower grade of that arm, corps, or department: *Provided*, That in the line of the Army all officers now above the grade of second lieutenant shall, subject to such examination, be entitled to promotion in accordance with existing laws and regulations."

Section 3 of that act provides, in part, as follows:

"SEC. 3. That the President be, and he is hereby, authorized to prescribe a system of examination of all officers of the Army below the rank of major to determine their fitness for promotion, such an examination to be conducted at such times anterior to the accruing of the right to promotion as may be best for the interests of the service: *Provided*, That the President may waive the examination for promotion to any grade in the case of any officer who in pursuance of existing law has passed a satisfactory examination for such grade prior to the passage of this act: *And provided*, That if any officer fails to pass a satisfactory examination and is reported unfit for promotion, the officer next below him in rank, having passed said examination shall receive the promotion: *And provided*, That should the officer fail in his physical examination and be found incapacitated for service by reason of physical disability contracted in line of duty he shall be retired with the rank to which his seniority entitled him to be promoted; * * *."

Section 2 of Article II of the Constitution, dealing with the power of the President, provides that "he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other Public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think

proper, in the President alone, in the Courts of Law, or in the Heads of Departments."

This provision of the Constitution divides inferior officers into two classes according to the source from which the power of appointment is derived. When Congress creates an office, but does not vest the power of appointment thereto in any of the persons specified, then the Constitution operates *proprio vigore* and immediately casts upon the President, by and with the advice and consent of the Senate, the duty of appointing thereto. Where, on the other hand, Congress itself designates the person or persons who are to appoint to a given office created by it, there the power and the duty of appointment comes immediately from Congress, and only mediately from the Constitution.

Congress, by the act of February 2, 1901, sec. 16 (31 Stat. 751), provided for the office of lieutenant colonel in the Quartermaster Corps, but said nothing as to the power of appointment thereto. The provisions of the Constitution, therefore, operate directly upon this office, and, without the intervention of Congress, obliges the President to nominate, and by and with the advice and consent of the Senate, to appoint thereto.

In this opinion it is only necessary to consider appointments the duty to make which is directly imposed on the President by the Constitution itself; no discussion of the other class will be entered upon. That a difference exists between the two is intimated in *United States v. Perkins* (116 U. S. 483, 485).

I entertain no doubt that the power of appointment of officers, the duty to appoint whom devolves directly on the President and Senate by virtue of the Constitution itself, is one involving a discretion not to be entirely controlled by Congress. This power is from a source above Congress, namely, the Constitution, and can not be destroyed by the inferior power.

In *Marbury v. Madison* (1 Cranch, 137, 155), Chief Justice Marshall, after quoting the clauses of the Constitution on the subject, said:

"These are the clauses of the Constitution and laws of the United States, which affect this part of the case. They seem to contemplate three distinct operations:

"1. The nomination: This is the sole act of the President, *and is completely voluntary.*

"2. The appointment: This is also the act of the President, *and is also a voluntary act*, though it can only be performed by and with the advice and consent of the Senate."

Attorney General Akerman expressed the same views in 13 Op. 516, as did the Court of Appeals of New York in *People v. Mosher* (163 N. Y. 32, 38, 39), and the Supreme Courts of Massachusetts in *Brown v. Russell* (166 Mass. 14, 25).

Nor does the fact that Congress is given power by the Constitution "to make Rules for the Government and Regulation of the land and naval Forces" enable it to control the President's discretion in respect of those appointments which the same supreme law requires him to make. The general power to regulate such forces can not be taken to nullify the specific mandate to the President to appoint to offices where Congress has made no other provision. (*Fitz John Porter's Case*, 18 Op. 18.)

A promotion in the Army is an appointment to a higher office therein. The custom, so far as I am aware, has always been to nominate the promoted officer to the Senate, and subsequently to appoint and commission him anew. (Senate Report Am. St. Pap. Military Affairs, vol. 2. p. 407; *General Wood's Case*, 15 Ct. Cls. 151; 107 U. S. 414.)

I do not think, therefore, that the act of October 1, 1890, makes it obligatory upon the President to promote the senior officer in the grade of major, when a vacancy exists in the grade of lieutenant colonel in the Quartermaster Corps, if, in his opinion, the record of the officer has been such as to indicate that he is disqualified for promotion.

Respectfully,

J. C. McREYNOLDS.

TO THE PRESIDENT.

CIVIL SERVICE—EXCEPTED POSITIONS.

Section 6 of the Post Office Department appropriation act of August 24, 1912 (37 Stat. 555), which prescribes regulations in respect to the removal of persons in the classified civil service, does not apply to those occupying excepted positions.

DEPARTMENT OF JUSTICE,

June 23, 1913.

SIR: I beg to refer to your letter of April 25 last, requesting an opinion whether section 6 of the Post Office Department appropriation act, approved August 24, 1912 (37 Stat. 555), which prescribes regulations in respect to the removal of persons from the "classified civil service," applies to those occupying what are known as "excepted" positions.

The provision referred to reads:

"Sec. 6. That no person in the classified civil service of the United States shall be removed therefrom except for such cause as will promote the efficiency of said service and for reasons given in writing, and the person whose removal is sought shall have notice of the same and of any charges preferred against him, and be furnished with a copy thereof, and also be allowed a reasonable time for personally answering the same in writing; and affidavits in support thereof; but no examination of witnesses nor any trial or hearing shall be required except in the discretion of the officer making the removal; and copies of charges, notice of hearing, answer, reasons for removal, and of the order of removal shall be made a part of the records of the proper department or office, as shall also the reasons for reduction in rank or compensation; and copies of the same shall be furnished to the person affected upon request, and the Civil Service Commission also shall, upon request, be furnished copies of the same: * * *."

It appears that the Civil Service Commission has advised you in this matter as follows:

"The classified service comprises all those positions which on the one hand are not subject to confirmation by the Senate and on the other hand are not those of mere laborer or workmen. Positions excepted from examination under Schedule A of the rules are therefore within the classified service and section 6 of the act of August 24, 1912, as it applies in direct terms to all classified employees, applies to

persons occupying positions excepted from examination under Schedule A."

The definition given by the Civil Service Commission of the classified service in the above statement is substantially that made by section 1 of Rule II of the Civil Service Rules, first promulgated, I am advised, in March, 1903.

Some of the positions declared by the Civil Service Rules to be within the classified service, but excepted in Schedule A thereof from examination, are as follows:

"Two private secretaries or confidential clerks to the head of each of the executive departments and one to each assistant head.

"One private secretary or confidential clerk to each of the heads of bureaus, appointed by the President and confirmed by the Senate, in the executive departments, if authorized by law.

"All persons appointed by the President without confirmation by the Senate.

"Attorneys, assistant attorneys, and special assistant attorneys."

Special exceptions are made in the schedule for each Department.

The result of the interpretation placed by the Civil Service Commission upon section 6 of the act of August 24, 1912, is that persons occupying the most confidential relations with the heads of departments, or for other reasons deemed advisable to be excepted from the general rule as to examination for competitive positions in the public service, can not be removed at the discretion of such heads, but only for such cause as will promote the efficiency of said service, and for reasons given in writing, with notice and opportunity to be heard.

The reasons for requiring this procedure for the removal of persons occupying competitive positions is apparent. Such persons are appointed as the result of examination in accordance with the Civil Service Rules, by which their qualifications for the positions they hold are determined, and they are not merely the personal selection of the head of the department in which they serve. Having no arbitrary right of selection, it may well be said that the head of a department should have no arbitrary right of removal.

But these considerations do not apply to persons occupying excepted positions. Since their appointment rests on personal selection, they can logically claim no better tenure. But the right of personal selection would be defeated if a person so selected could not be removed at the pleasure of the appointing power.

If, therefore, the restrictions in the act in question are applied to persons occupying excepted positions, one of the chief purposes of such exceptions—which are expressly authorized by the civil service act (sec. 7) and rules (Rule II, sec. 3)—will be defeated. But there is nothing in the history of the act which suggests that Congress had any intention to limit the right of the appointing power to select persons for the excepted positions.

The specific cause for this legislation was a controversy about the Railway Mail Service (48 Cong. Rec. 4653-4657, 4988-5009, 5197-5241, 5625-5638, 9952-9953, 10670-10676), the positions in which are competitive, and no question of excepted positions was involved or mentioned in the debates on the matter.

The situation here appears to be analogous to that presented in the *Holy Trinity Church* case (143 U. S. 457), where it was held that a thing within the language of the statute was not within the statute because not within its spirit and purpose, as shown by its history and the evil intended to be remedied.

For the reasons stated, I am of the opinion that the term "classified civil service," in section 6 of the act of August 24, 1912, was used in the more popular sense of the competitive service and therefore should not be held to include excepted positions, unless such positions have been filled as competitive positions are filled, in which event, under Rule II, paragraph 3, of the Civil Service Rules, the person appointed is entitled to all the rights of a competitive employee.

Respectfully,

WILLIAM R. HARR,
Assistant Attorney General.

Approved:

J. C. McREYNOLDS.

To the SECRETARY OF COMMERCE.

184 *Grant of Leave to Officer of Engineer Corps.*

**AUTHORITY TO GRANT LEAVE OF ABSENCE TO OFFICER
OF THE ENGINEER CORPS TO ACCEPT CIVIL OFFICE.**

The Secretary of War is prohibited by section 1224 of the Revised Statutes from granting leave of absence to an officer of the Engineer Corps in order that he may be employed by the Interstate Commerce Commission to assist in the valuation of properties of common carriers under the act of March 1, 1913 (37 Stat. 701).

DEPARTMENT OF JUSTICE,
July 2, 1913.

SIR: I have the honor to reply to your letter of April 3, 1913, in which you ask my opinion on the following question:

"Whether you have authority to grant leave of absence to an officer of the Engineer Corps in order that he may be employed by the Interstate Commerce Commission to assist in the valuation of properties of carriers under the act of March 1, 1913."

I am of opinion that section 1224 R. S., to which you refer, prohibits such grant of leave.

This section is as follows:

"SEC. 1224. No officer of the Army shall be employed on civil works or internal improvements, or be allowed to engage in the service of any incorporated company, or be employed as acting paymaster or disbursing agent of the Indian Department, if such extra employment requires that he shall be separated from his company, regiment, or corps, or if it shall otherwise interfere with the performance of the military duties proper."

Of course it goes without saying that the grant of leave for the purpose proposed, covering, as stated, two or three years, would require the officer to "be separated from his * * * corps," and would "interfere with the performance of the military duties proper."

And also it seems plain that the section applies as well to officers of the Engineer Corps as to the other officers of the Army. That was the opinion of Attorney General Brewster (18 Op. 11), and *semble* of Acting Attorney General Maxwell (20 Op. 604), and of the Judge Advocate General (May 17, 1876, R. 37, 540; and May 18, 1876, R. 37, 540). Indeed the legislative history shows that the engi-

neers were peculiarly the subject of the legislation, and that it was inspired chiefly by the opinion that their non-military activities tended to cripple their corps. (Cong. Globe, 25th Cong. 2d sess., vol. 6, p. 133 *passim*, and see the history fully stated in the Judge Advocate General's opinion of March 31, 1913, paragraph 7.) It is true that on this point the opinion of my predecessor reported in 28 Op. 270 looks the other way in its ultimate result, but his attention was not called to this section 1224 R. S., but only to the relation between section 1158 R. S. and section 9 of the act of March 4, 1909 (35 Stat. 1027), and he wrote exclusively in answer to a specific question as to that relation.

The only other question is whether the kind of work proposed is covered by the section—that is, whether it is employment on “civil works or internal improvements.”

No doubt, as may be urged, these words are susceptible of a construction which would limit them to work on fixed physical structures and so exclude this case, but this would be an excessively strict construction, not required by the language, and not in accord with the spirit and purpose of the act, which, as stated, was to keep the engineers on military duty with their corps. I perceive no reason for assuming that Congress intended to draw a distinction between civil work of building and the particular kind of civil work here proposed, which is plainly no less inconsistent with the desired presence of the officers with their corps and upon military duty. In fact, Congress itself assumed the application of the section to civil work other than that of physical construction by making express provision for such details (to act as Indian agents under the Secretary of the Interior, 30 Stat. 573; for “special duty with reference to Indian education,” 21 Stat. 35; for service on the California Débris Commission, 27 Stat. 507).

This was the conclusion reached by Attorney General Devens, who held that the section precluded detail of an officer to aid in the Geological Survey (16 Op. 499), a duty which can not be distinguished from this.

It might be urged that the express specification of employment “as acting paymaster or disbursing agent of the

Indian Department " indicates that this type of employment would not have been covered by the general clauses; but the real occasion for this specification was the prior existence of a provision passed in 1834 (4 Stat. 735-7) that the President might require any military officers of the United States to execute the duties of an Indian agent. The express clause was necessary to create an exception to this existing special provision, and it was ruled to have had this effect by one of my predecessors, 14 Op. 573, 574.

In coming to this conclusion I have not overlooked the controversy over the meaning of a somewhat similar phrase ("public works of the United States") in the lien and eight-hour laws. In the latest decision on this subject the Supreme Court held that the phrase is not limited to fixed works on land, but includes naval vessels, *Title Guaranty and Trust Company v. Crane Company*, 219 U. S. 24; and it has even been held that seamen engaged on a Government vessel in removing snags and obstructions from rivers and harbors are employed upon "public works of the United States" within the meaning of the eight-hour law. (*United States v. Jefferson*, 60 Fed. 736.)

In any event, as the Supreme Court indicated in the *Title Guaranty and Trust Company's* case, great weight must be given the policy of the statute, and in this instance that seems to be very clear.

For these reasons and for the reasons exhaustively given to the same result in the Judge Advocate General's opinion, dated March 31, 1913, I am of opinion, as above stated, that you have not the authority suggested.

Very respectfully,

J. C. McREYNOLDS.

TO THE SECRETARY OF WAR.

AUTHORITY TO CONTRACT FOR STAR-ROUTE SERVICE.

As the Postmaster General is expressly authorized by law to enter into contracts for carrying the mail for a term not exceeding four years without regard to the appropriations therefor, and as the Post Office appropriation act of March 4, 1913 (37 Stat. 791) does not undertake to limit that authority, he may contract for star-route service for the current fiscal year in excess of the appropriation therefor contained in that particular act.

DEPARTMENT OF JUSTICE,

July 18, 1913.

SIR: The Department has given careful consideration to your several communications with reference to your authority to contract for star-route service in excess of the appropriation therefor contained in the act of March 4, 1913 (37 Stat. 800), making appropriations for the service of the Post Office Department for the fiscal year ending June 30, 1914, which provides:

"For inland transportation by star routes (excepting service in Alaska), including temporary service to newly established offices, \$7,105,000: *Provided*, That no part of this appropriation shall be expended for continuance of any star-route service the patronage of which shall be served entirely by the extension of Rural Delivery Service, nor shall any of said sum be expended for the establishment of new star-route service for a patronage which is already entirely served by Rural Delivery Service."

You say that before the passage of the act it was found, for reasons stated by you but unnecessary to repeat here, that the appropriation would be insufficient, and that you therefore submitted a request to each House of Congress that the appropriation be increased to \$7,400,000, but that such increase was not authorized.

The following provisions of the Revised Statutes, you say, affect the establishment of star-route service:

"SEC. 3956. No contract for carrying the mail shall be made for a longer term than four years, * * *."

"SEC. 3965. The Postmaster General shall provide for carrying the mail on all post-roads established by law, as often as he, having due regard to productiveness and other circumstances, may think proper.

"SEC. 3968. The Postmaster General may contract for carrying the mail on any plank-road in the United States, when the public interest or convenience requires it.

"SEC. 3975. The Postmaster General may, when he deems it advisable, contract for the transportation of the mails to and from any post office; * * *."

Attention is also called to the act of July 26, 1892 (27 Stat. 268), which provides that—

"after providing by general advertisement for the transportation of the mails in any State or Territory as authorized by law, the Postmaster General may secure any mail service that may become necessary before the next general advertisement for said State or Territory by posting notices, etc."

But this statute does not appear to have any particular bearing on the question presented.

Express prohibitions upon the expenditure of money by an executive department in excess of appropriations, as well as upon involving the United States in any contract or obligation for the payment of money unless the same is authorized by law, are contained in the following provisions of the Revised Statutes:

Section 3679, as amended by the act of February 27, 1906 (34 Stat. 27, 49):

"No Executive Department or other Government establishment of the United States shall expend, in any one fiscal year, any sum in excess of appropriations made by Congress for that fiscal year, or involve the Government in any contract or other obligation for the future payment of money in excess of such appropriations *unless such contract or obligation is authorized by law*. Nor shall any Department or any officer of the Government accept voluntary service for the Government or employ personal service in excess of that authorized by law, except in cases of sudden emergency involving the loss of human life or the destruction of property. All appropriations made for contingent expenses or other general purposes, *except appropriations made in fulfillment of contract obligations expressly authorized by law, or for objects required or authorized by law without reference to the amounts annually appropriated therefor*, shall, on or before the beginning of each fiscal year, be so apportioned by monthly or other allotments as to prevent expenditures in one portion of the year which may necessitate deficiency or additional appropriations to complete the service of the fiscal year for which said appropriations are made; and all such apportionments shall be adhered to and shall not be waived or modified except upon the happening of some extraordinary emer-

gency or unusual circumstance which could not be anticipated at the time of making such apportionment, but this provision shall not apply to the contingent appropriations of the Senate or House of Representatives; and in case said apportionments are waived or modified as herein provided, the same shall be waived or modified in writing by the head of such Executive Department or other Government establishment having control of the expenditure, and the reasons therefor shall be fully set forth in each particular case and communicated to Congress in connection with estimates for any additional appropriations required on account thereof. Any person violating any provision of this section shall be summarily removed from office and may also be punished by a fine of not less than one hundred dollars or by imprisonment for not less than one month.

"Sec. 3732. No contract or purchase on behalf of the United States shall be made, *unless the same is authorized by law* or is under an appropriation adequate to its fulfillment, except in the War and Navy Departments, for clothing, subsistence, forage, fuel, quarters, or transportation, which, however, shall not exceed the necessities of the current year."

It appears that sections 3956, 3965, 3968, and 3975 of the Revised Statutes expressly authorize you to contract for carrying the mail for a term not exceeding four years without regard to the appropriations therefor. A contract of that kind, therefore, would be "authorized by law" within the meaning of sections 3679 and 3732, Revised Statutes, unless the appropriations made by Congress for the service of the Post Office Department for the fiscal year ending June 30, 1914, contained in the act of March 4, 1913, *supra*, are to be taken as limiting the power to contract for the transportation of the mail for that fiscal year.

In view of the detailed way in which Congress, in its annual appropriations acts, now provides for the various kinds of mail service, it may be contended that the appropriations are intended as a limitation upon your general power to contract for that fiscal year. On the other hand, considering the nature of the subject matter dealt with, the fact that the amount of mail necessary to be carried can

not be accurately estimated in advance, as well as the fact that Congress has seen best to confer upon you general authority to contract for such transportation for several years in advance without regard to appropriations, it may well be argued that the appropriation for such service is not necessarily to be construed as preventing you from entering into contracts therefor which may possibly lead to a deficiency for that year.

In *New York Central & Hudson River Railroad v. United States* (21 Ct. Cl. 468, 472) the Court of Claims, referring to sections 3679 and 3732, Revised Statutes, said:

“Those sections apply to the public service in general and must not only be construed in connection with other statutes, but must yield to the special provisions directly and solely applicable to the Post Office Department.

“The immense postal service, interwoven as it is with all the business and social interest of the people, is a continuing service which must be provided for not separately for one year but for succeeding years, often in advance of, but in reliance upon, the usual annual appropriations. Much is specially intrusted to the judgment and discretion of the Postmaster General. A whole chapter of the Revised Statutes is devoted to the subject of contracts for carrying the mails (sections 3941–3963). The Postmaster General is authorized to enter into such contracts, and the only limitation as to the time they may run is found in section 3956, where there is a prohibition against making them for a longer term than four years by land and two years by sea, and this latter limitation is changed to four years by the act of May 17, 1878, chapter 107, section 5 (1 Supp. Rev. Stat. 324).”

It is true that in that case the court used language indicating that the contract there involved would have been invalid if it had exceeded the annual appropriation therefor. But this was because the contract under consideration provided, in terms, that payment was to be made out of special appropriations thereafter to be made. The question here is as to the authority of the Postmaster General to contract for star-route service in excess of the appropriations therefor for the present fiscal year, not as to the right

of a contractor to recover if he should make a contract dependent upon the sufficiency of the appropriation.

It appears from a memorandum of the Second Assistant Postmaster General, which you have called to my attention, that the view above expressed is in accordance with the practice of your department. In the memorandum referred to it is said:

"As showing clearly that Congress at this time understands this rule of construction and the practice of the department and approves it, attention is called to the language used by the chairman of the Committee on Appropriations of the House on the 10th of the present month when House joint resolution 80 was pending. This resolution makes an urgent deficiency appropriation for temporary and auxiliary clerks in post offices and for substitute, auxiliary, and temporary city delivery carriers. In the discussion of the matter the following inquiry was made by Mr. Mondell and reply made by Mr. Fitzgerald, chairman:

" ' Mr. MONDELL. Mr. Speaker, reserving the right to object, the Post Office appropriation act, which is referred to in this resolution, contained a provision authorizing the Postmaster General to readjust the contracts of star-route carriers. That was the only provision contained in the law authorizing a readjustment of existing contracts and increased contract payments. It was intended to meet the increased cost of carrying the star routes by reason of the establishment of the parcel post. I have not any doubt but that these items are necessary as deficiency items, and should be provided for at this time, but I want to ask the gentleman from New York whether he has taken into consideration the deficiencies that it will probably be necessary to provide for in the increased cost of the star-route service?

" ' Mr. FITZGERALD. Mr. Speaker, I have not given it any consideration, because the department has not made any suggestion about it. *The star-route contract service, however, would be in a different category. If the department is authorized to make the contracts, the work would be performed and a deficiency might legally be incurred, in my opinion, under such a situation.* This is for the employ-

ment of clerks and carriers, temporary and auxiliary, and under the law, although the duty of rendering certain services is imposed upon the department, they must be rendered within the appropriations made for the purpose by Congress. A deficiency can not be incurred so as to create a liability in excess of the appropriations made by Congress.'” (50 Cong. Record 1496.)

It is further stated by the Second Assistant Postmaster General in the memorandum referred to:

“Practically all contracts for the transportation of the mails are involved in this question and a consideration of the conditions under which they must be entered into will indicate the necessity for the rule mentioned in the court decision above quoted.

“The orders carrying pay for the transportation of the mails on railroad routes are made for a term of four years based upon data obtained before the beginning of the first year covered. These are continuing contracts subject to future orders of the Postmaster General but no appropriation exists at the time to fulfill their obligations excepting for the immediate fiscal year. Furthermore, the amount necessary for such year is always a question of estimate which must be made months before the weighing occurs upon which the pay is based and nine or ten months before the fiscal year begins for which the appropriation is made. Contracts for screen wagon service in cities are made for a period of four years upon proposals received under an advertisement issued prior to the beginning of the first year. No appropriation exists at the time to cover these contract obligations excepting for the first fiscal year. During a long session of Congress the contracts must be all completed before an appropriation bill passes for the one year. Furthermore, the amount appropriated is based upon estimates made eight or nine months before the beginning of the fiscal year and before any proposals are received under the advertisement and therefore without exact knowledge as to the obligations to be made. In exactly similar manner contracts for steamboat and star route services are entered into and the same contingencies exist with reference to other transportation agencies of the de-

partment. During a year when there is a short session of Congress, which is every other year, Congress will have adjourned on the 4th of March and prior to the final determination as to what contracts must necessarily be entered into under advertisements pending in order to provide for service beginning the following 1st of July. In such cases it would be impossible to secure a deficiency appropriation or to secure a change in the pending bills in order to take care of the service from the following 1st of July.

"These examples will illustrate clearly the impossibility of providing adequately for the transportation of the mails without the exercise on the part of the Postmaster General of the power and authority to enter into contracts notwithstanding the fact that the existing appropriation may not be adequate to cover the obligations."

Under all the circumstances I do not think the authority expressly conferred upon you by law to contract for the transportation of the mail should be held to be limited by implication to the appropriation for star-route service made in the act of March 4, 1913, for this fiscal year. That appropriation indicates, of course, the amount Congress estimated it would be necessary to expend during this period for such purpose, and in the absence of express authority to incur any additional obligation you would be forbidden by section 3679, Revised Statutes, *supra*,^{*} from doing so. But express authority to contract for the transportation of the mails without regard to appropriations has been given you by the statutes above quoted, and the particular appropriation act does not undertake to limit that authority. It is to be assumed that Congress deemed the limitations expressly placed by law upon the making of contracts for the transportation of the mails, as well as the fact that it would be incumbent upon the Postmaster General to explain any deficiency incurred, sufficient checks upon the broad power which the nature of the subject matter involved required to be given him in this respect.

In reaching this conclusion I have not overlooked the opinion of Attorney General Mason (4 Op. 391), but I do not regard anything there said as controlling in the present

situation, especially in view of the practical construction which has been placed upon the legislation in question.

Respectfully,

WILLIAM R. HARR,
Assistant Attorney General.

Approved:

J. C. McREYNOLDS.

TO THE POSTMASTER GENERAL.

CIVIL SERVICE—NONASSEMBLED EXAMINATIONS.

The proviso of section 7 of the census act of July 2, 1909 (36 Stat. 3), which requires that all examinations for positions in the government service shall be had in the State or Territory in which the applicant resides, does not apply to the so-called non-assembled examinations.

DEPARTMENT OF JUSTICE,
July 22, 1913.

SIR: I beg to acknowledge the receipt of your communication of the 18th instant, inclosing a letter from the Civil Service Commission of the same date, and requesting my opinion upon the question of law presented thereby.

The letter from the commission reads as follows:

"We have the honor to present to you, for reference to the Attorney General for opinion, the following question:

"The first proviso of section 7 of the census act approved July 2, 1909 (36 Stat. 3), provides that—

"'Hereafter all examinations of applicants for positions in the Government service, from any State or Territory, shall be had in the State or Territory in which such applicant resides, and no person shall be eligible for such examination or appointment unless he or she shall have been actually domiciled in such State or Territory for at least one year previous to such examination.'

"The commission has one form of examination which requires the assembling of competitors in examination rooms for the purpose of answering questions on scholastic or other subjects which are deemed pertinent to the examination.

"Another form of examination given by the commission does not necessitate the assembling of the competitors for the purpose of undergoing any of the tests. This form of examination consists of careful and exhaustive inquiry and investigation by the commission into the applicant's history, including his educational attainments, the work accomplished by him, his full experience record, and sometimes his physical condition. The commission calls upon applicants for this type of examination to fill out forms upon which they are required to give a complete history of their education, their training, and their business or professional experience, and sometimes to furnish the record of a medical examination described in detail and set forth in the form. In such examinations competitors are sometimes called upon to furnish theses upon subjects connected with the duties of the position for which the examination is held, or copies of original published works. This evidence submitted by applicants constitutes the basis of the commission's examination, supplemented of course by satisfactory corroborative evidence obtained directly by the commission.

"Since the approval of the act of July 2, 1909, competitors have been required, in the assembled examinations, to assemble and take the examinations in their respective States; but in the case of nonassembled examinations, competitors have been required to show that they have been actually domiciled in the State or Territory in which they reside for at least one year previous to the examination, and where a competitor was temporarily absent from his State at the time of filing his application he has not been required to return to such State for the purpose either of filling out his application and making oath to it or of furnishing the other data or information required in connection with his examination, as above described.

"The question has now arisen, whether the provision of law above quoted does not require that in the nonassembled examinations above described a competitor who is temporarily absent from the State or Territory in which he has his residence and actual domicile shall return to such State or Territory for the purpose of filling out and making oath to his application and furnishing such other data as the

commission may call upon him to furnish in connection with his examination. Upon this point we ask the opinion of the Attorney General."

The meaning of the statute in question is not entirely clear, the ambiguity arising from the fact that, while it refers to "*all* examinations of applicants for positions in the Government service, from any State or Territory," it proceeds to say that they "shall be *had* in the State or Territory in which such applicant resides," and it appears from the letter of the commission that the nonassembled examination is not *had*—that is, held—at any particular place. It would seem from the use of the word "*had*" that Congress had in mind the method of examination referred to in section 3 of the civil service act of January 16, 1883 (22 Stat. 403), which provides that the Civil Service Commission "shall, at Washington, and in one or more places in each State and Territory *where examinations are to take place*, designate and select a suitable number of persons, not less than three, in the official service of the United States, residing in said State or Territory, * * * to be members of boards of examiners," and that "such boards of examiners shall be so located as to make it reasonably convenient and inexpensive for applicants *to attend before them*," and that, "where there are persons to be examined in any State or Territory, *examinations shall be held therein* at least twice in each year."

At the same time the manifest purpose of the act is to throw further restrictions about the requirement that an applicant for examination or appointment shall be actually domiciled in the State or Territory which he claims as his residence, and to which, under the rule of apportionment, he is to be assigned, and it may be that the statute might originally have been construed to apply to the preparation of papers by one taking the so-called nonassembled examination. As it is, however, in view of the practical construction which has been placed upon the statute for some years by the body charged with its administration, I do not feel warranted in holding such construction incorrect.

Respectfully,

J. C. McREYNOLDS.

TO THE PRESIDENT.

PACIFIC GAS & ELECTRIC CO.—VALIDITY OF CONTRACT.

The contract entered into between the United States and the Pacific Gas & Electric Co., in connection with the construction, operation and maintenance of the Salt River reclamation project, neither violates the provisions of the antitrust law of July 2, 1890 (26 Stat. 209), nor the provision of the act of April 16, 1906 (34 Stat. 116), which, in authorizing the Secretary of the Interior to lease surplus power derived from reclamation projects, provides that preference shall be given to municipal uses.

By the terms of this contract the Pacific Gas & Electric Co. surrendered and conveyed all of its rights within the physical limits of the Salt River reclamation project and in lieu thereof the United States agreed to furnish to the company in the city of Phoenix, Ariz., a specified amount of electrical energy generated at its works at the Roosevelt Reservoir at a stipulated sum of money and for a term not exceeding ten years, and the United States further agreed that while serving power to the company under the terms of the contract it would refrain from entering into a general retailing of power to customers in the city of Phoenix, and from furnishing power to any one in said city to be again sold or retailed.

DEPARTMENT OF JUSTICE,

July 25, 1913.

SIR: By his letters of December 20, 1912, and February 26, 1913, your predecessor brought up for the consideration and opinion of the Attorney General certain questions respecting the legality of a contract entered into by the United States, under date of June 22, 1907, with the Pacific Gas & Electric Co., a corporation organized under the laws of the Territory of Arizona. In the letter of December 20, 1912, it is stated:

"The contract in question was executed by a supervising engineer of the United States Reclamation Service and approved by the Acting Secretary of the Interior, in 1907, in connection with the construction, operation, and maintenance of the Salt River reclamation project.

"As recited in the contract itself, and as shown by the records of this department, the Pacific Gas & Electric Co. was the owner of certain water rights in canals within the physical limits of the reclamation project, and, pursuant to the policy of merging all irrigating canals in Salt River Valley in the Government reclamation project, so that

when completed and paid for the water users would control all irrigation works therein, it was deemed necessary to acquire the rights of the electric company. Such an adjustment was reached through the contract in question wherein the electric company surrendered and conveyed to the United States all of its rights and in lieu thereof the United States agreed to furnish to the company in the city of Phoenix, Ariz., a specified amount of electrical energy generated at works of the United States at the Roosevelt Reservoir. For this energy the company obligates itself to pay 1½ cents per kilowatt hour for all power furnished and consumed, the receipts therefor being credited to the Salt River project, thereby operating to reduce the charges payable by the landowners and irrigators therein. The contract was for a term not exceeding 10 years."

From that letter also I excerpt the following:

"It is to the interest of the United States and other water users in the reclamation project that as large a revenue as possible be derived from power development in the project, and in this respect the contract was believed to be advantageous.

* * * * *

"In connection with the whole question, attention is directed to the fact that the Pacific Gas & Electric Co. is a public-service corporation organized and existing under the laws of Arizona operating under a franchise granted to it by the city of Phoenix, and that the power furnished to the company is in furtherance of enabling it to conform to the requirements of said franchise. It would seem to be within the power of the State or local authorities to proceed against the company for violation of any of the terms of its franchise, and within the power of the State to regulate the rates at which it furnishes power to consumers. (*Wilcox v. Consolidated Gas Co.*, 212 U. S. 19; *Stanislaus v. San Joaquin & King's River Canal & Irrigation Co.*, 192 U. S. 201.)"

Article 11 of the contract is as follows:

"The party of the first part further agrees, while serving power to second party under the terms of this contract, to refrain from entering into a general retailing of power

to customers in the city of Phoenix, Ariz., or from furnishing power to anyone in said city to be again sold or retailed. It is agreed, however, that the party of the first part shall have the right to sell or lease power in the city of Phoenix, Ariz., at any time in blocks of 100 to 500 kilowatts and over, to anyone to be used for manufacturing industries, waterworks or pumping plants."

In the letter of February 26, 1913, it is said that this provision has been regarded by the Reclamation Service as not operative to prevent the furnishing of electric power to the city of Phoenix for lighting purposes "provided the city did not retail the power, but intended to use it only for municipal purposes"; and the Secretary adds:

"The language of article 11 seems clear upon this point and contains no restriction upon the Government except that it shall refrain from entering into a general retailing of power to customers in the city of Phoenix or from furnishing power to anyone to be sold again or retailed but that the Government shall have the right to sell or lease power in the city of Phoenix at any time in blocks of 100 to 500 kilowatts and over."

It appears, however, from the correspondence, that the validity of the contract had been challenged upon the ground that the restrictive features found in the eleventh article were offensive both to the third section of the anti-trust law of July 2, 1890 (26 Stat. 209), denouncing contracts, combinations, or conspiracies in restraint of trade or commerce in the Territories of the United States, and to the provision of the act of April 16, 1906 (34 Stat. 116, 117), quoted below, which, in authorizing the Secretary of the Interior to "lease" surplus power derived from reclamation projects, provides that preference shall be given to municipal uses. In view of these criticisms, your predecessor requested to be advised whether the contract was unlawful, and, if so, what steps could be taken to abrogate it.

Section 7 of the reclamation act of June 17, 1902 (32 Stat. 388-9), provides:

"That where in carrying out the provisions of this act it becomes necessary to acquire any rights or property, the

Secretary of the Interior is hereby authorized to acquire the same for the United States by purchase or by condemnation under judicial process, and to pay from the reclamation fund the sums which may be needed for that purpose * * *.”

Section 10 of that act provides:

“That the Secretary of the Interior is hereby authorized to perform any and all acts and to make such rules and regulations as may be necessary and proper for the purpose of carrying the provisions of this act into full force and effect.”

By the act of April 16, 1906 (34 Stat. 116, sec. 5), it is provided:

“That whenever a development of power is necessary for the irrigation of lands under any project undertaken under the said reclamation act, or an opportunity is afforded for the development of power under any such project, the Secretary of the Interior is authorized to lease for a period not exceeding 10 years, giving preference to municipal purposes, any surplus power or power privilege, and the moneys derived from such leases shall be covered into the reclamation fund and be placed to the credit of the project from which such power is derived: *Provided*, That no lease shall be made of such surplus power or power privilege as will impair the efficiency of the irrigation project.”

These enactments confer upon the Secretary of the Interior broad authority, for the purpose of effectuating the reclamation policy of Congress, and necessarily, in exercising the authority thus granted, he enjoys a wide discretion. It appears that he thought it essential to the proper development of the Salt River project that the water rights claimed by the Pacific Gas & Electric Co. should pass into the ownership and control of the Government, for the ultimate benefit of the water users. Acting under section 7 of the reclamation act, he might have purchased the rights for a cash consideration, if the company had been willing to sell for a price which he deemed commensurate with the value of the rights to the project. Or, possibly (under the same section), he might have acquired them through con-

demnation proceedings. In either event, the moneys required for the purchase must have been drawn from the reclamation fund, and the amount might have been seriously influenced by the degree in which the loss of those rights to the company, without substituting some equivalent source of electrical supply, might affect its future ability to carry on its business. It was to overcome this difficulty, I judge, that the restrictive provisions were inserted in the contract, they being, as I gather from the facts afforded by your predecessor, a substantial part of the consideration which the Government gave and the company accepted for the surrender of its water rights in perpetuity. Apart from those provisions the lease is clearly unobjectionable, since it is not only confined to a term (10 years) permissible under the act of 1906, *supra*, but also provides for a money consideration moving from the company to the Government, which, according to the statement before me, was deemed by the Secretary to be in itself an adequate return for the power furnished, and a distinct advantage from the standpoint of the project.

I proceed, therefore, to consider the validity of the restrictive provisions contained in the eleventh article. By these the Government agrees that while serving power to the company under the contract it will "refrain from a general retailing of power to customers in the city of Phoenix" and "from furnishing power to anyone in said city to be again sold or retailed." The act of 1906 (sec. 5, *supra*) directs the Secretary, in making leases of surplus power, to give preference to municipal purposes; but it is obvious that this direction could not have been intended to interfere with what is plainly the dominant purpose of the legislation, viz, to dispose of the power in each case for the best advantage of the irrigation project that produces it. Congress declares in this law that the moneys coming from leases shall be covered into the reclamation fund and placed to the credit of the particular project from which the power is derived, and takes care to provide expressly that no such lease shall be made as will impair the efficiency of the project. Through leases of this character, each project is to be made, to the extent possible,

the means of paying for itself. The money proceeds operate to reduce *pro tanto* the financial burdens which must ultimately fall upon the water users. Therefore it is the first duty of the Secretary to consider the welfare of the project and the water users. The duty to prefer municipal purposes in the making of leases is secondary and incidental. If, where a surplus of power became available, opportunities should occur to dispose of it for municipal uses, and the terms offered in return were at least as advantageous to the project as the terms offered in behalf of other uses, it would be the duty of the Secretary to make the lease for the municipal uses, but not so if, in his judgment, the contract would prove more profitable if made in the other way. If the lease for municipal uses promised less advantage, he could not make it without favoring the mere incident of the statute to the detriment of its prime object. Following out this same principle, it is equally apparent that a lease which involves not only a disposition to the lessee of a definite quantum of power, but also a restriction upon the future disposition of surplus power, which the Government may control, but which the lessee does not take, can not be deemed objectionable merely because of the possibility, or even the certainty, that the surplus may be in demand for municipal purposes. The real question concerns the authority of the Secretary to agree to such a restriction in any event; and this question would present itself quite as strongly if the words concerning municipal purposes were subtracted from the statute as it does with the statute as it stands. May the Secretary, in leasing a specified quantity of power, lawfully agree not to dispose of other surplus power, or agree not to dispose of it in certain ways? My answer is that if, in view of the consideration offered, he believes such a contract advantageous to the project, there is nothing in the act of 1906 which forbids him to make it, assuming, of course, that the consideration itself is a lawful one. Such a contract might be improvident, or it might be very wise, according to the circumstances; but that is not the question, since I have not to do with the wisdom of such a contract, but only with its legality. The Secretary might lease the

whole of the power or only a part. If he leased but a part outright, his assent to restrictions upon the leasing of the remainder would amount to no more than a qualified disposition of that which, pursuant to this statute (with due regard to the maximum term which it prescribes), he would be competent to dispose of entirely. It does not appear that when this contract was made there was opportunity to make a better contract, or one equally good, or, indeed, any contract at all, to supply power for municipal purposes. Upon the whole, I am unable to see how the contract could be regarded as contravening the act of 1906, unless it may be said that the Secretary, in accepting the conveyance of the company's water rights instead of money as a part of the consideration, went beyond the authority conferred on him by law. But, assuming that, if it stood upon the act of 1906 alone, a lease concerning power should rest upon a money consideration which, in the judgment of the Secretary, afforded in itself an adequate return for the power disposed of, it does not appear from the facts stated that such a consideration was absent in this case. Furthermore, I am of the opinion that as the Secretary, under the original reclamation act, had an independent authority to acquire the water rights by the use of the reclamation fund, the form which the transaction took was merely in legitimate avoidance of a useless circuitry. For if it be assumed that, without the conveyance of water rights, the lease, including the restrictive provisions, would have brought more money into that fund, it must also be assumed that an independent purchase of the rights would have diminished it in an equal degree at the least.

The other point of inquiry concerns the application of the antitrust law. Since the execution of the contract Arizona has been admitted into the Union, and, as the contract has nothing to do with interstate or foreign commerce, but deals exclusively with matters local to the State, a compliance with its terms now could not *per se* be violative of the antitrust law; and, after recognition of its validity by a continuous course of action since the antitrust law became inapplicable, it is doubtful whether the United

States would now be permitted to repudiate the contract, even though its execution had originally violated that law.

But I do not think it was in its inception prohibited by the antitrust act. While it is not so stated specifically, yet it is apparent that the Pacific Gas & Electric Co. was the sole producer of electricity from the water power furnished by the canals over which the Government desired to secure complete control, and that it was not the design of the Government to enter into competition with that company in the sale of electric energy. The matter in which the United States had especial interest was the obtaining of full control over the water supply for irrigation purposes, and, as an incident to that object it was preferable and indeed necessary, that the canals be relieved of all claims of the company. To accomplish this, it was essential that the interest of the company be purchased in some way by the United States. Under these circumstances I think the covenant upon the part of the United States not to sell electricity at retail in competition with the company in Phoenix was one the company had a right to exact for its own protection and that it did not impose an unlawful restraint upon the United States with reference to the subsequent sale of electricity. (*United States v. Addyston Pipe & Steel Co.*, 85 Fed. 271, 281, 282; *Standard Oil Co. v. United States*, 221 U. S. 1.)

Whether the antitrust act applies to the agents of the United States in making contracts under circumstances of like character to those above stated is a question upon which I do not find it necessary to express an opinion.

Respectfully,

J. A. FOWLER,
Acting Attorney General.

To the SECRETARY OF THE INTERIOR.

COLLECTORS OF PORTS IN ENLARGED DISTRICTS—TEN-
URE OF OFFICE.

The continuance in office of collectors of ports in the enlarged districts until expiration of their existing commissions, was duly authorized by the act of August 24, 1912 (37 Stat. 434), under

which the President's order of March 3, 1913 (49 Cong. Rec. 4702), reorganizing the customs service, was issued.

DEPARTMENT OF JUSTICE,

July 26, 1913.

SIR: I have the honor to reply to your letter of July 1, 1913, requesting an opinion on the question whether the reorganization of the customs service under President Taft's order of March 3, 1913, had the effect of terminating the commissions of all the collectors of ports in the enlarged districts; or, in other words, whether the order was valid in so far as it directed that the collectors at the headquarters ports should continue to hold office as collectors for the new districts until the expiration of their existing commissions. This question is raised, as you state, by a contention which has been advanced that the collectors can not lawfully act over districts defined differently from those to which they were originally appointed by the President and confirmed by the Senate.

I am of the opinion that the continuance of the collectors as collectors over the enlarged jurisdictions was duly authorized by the act under which the order was issued. (Sundry civil appropriations act of August 24, 1912, 37 Stat. 434.)

It is important to note at the outset that collectorships are not offices created and defined by the Constitution. They are created by Congress under authority implied from the power "to lay and collect taxes, duties, imposts, and excises." (Const., Art. I, sec. 8.) Being of legislative creation, they are therefore subject to the usual and elementary rule that offices which are legislative only, and not constitutional, may be abolished or changed at the pleasure of the legislature, and the duties thereof may be increased or diminished, and the rights and privileges thereof varied, increased, decreased, or abolished. (*Andrews v. United States*, 2 Story 202, 208; *Bryan v. Cattell*, 15 Iowa, 538, 553; *Attorney General v. Squires*, 14 Cal. 12; *State v. Gales*, 77 N. C. 283, 285; *Reals v. Smith*, 8 Wyo. 159, 170.)

Thus, in *Gausson v. United States* (97 U. S. 584), where a statute imposed new duties upon the collector of the port

of New Orleans, the court held in an action on his official bond for subsequent misconduct that the original bond still remained binding within its original scope because the law "may impose a new duty upon him, but it leaves his office, as collector, untouched." (97 U. S. 592.)

It is clear, therefore, that if Congress had itself directly in express terms enacted that the jurisdiction of the specified collectors should thereafter include the additional territory there could be no doubt as to the validity of its action. Nor is there any doubt that Congress can constitutionally confer upon the President authority to make the same changes (*Field v. Clark*, 143 U. S. 649), especially where, as here, the subject is the peculiarly executive function of administering the laws. The inquiry reduces itself, therefore, to the question of the intent of Congress in the act of authorization.

The pertinent provisions of this act are as follows:

"The President is authorized to reorganize the customs service and cause estimates to be submitted therefor on account of the fiscal year nineteen hundred and fourteen bringing the total cost of said service for said fiscal year within a sum not exceeding ten million one hundred and fifty thousand dollars, instead of ten million five hundred thousand dollars, the amount authorized to be expended therefor on account of the current fiscal year nineteen hundred and twelve; in making such reorganization and reduction in expenses he is authorized to abolish or consolidate collection districts, ports, and subports of entry and delivery, to discontinue needless offices and employments, to reduce excessive rates of compensation below amounts fixed by law or Executive order, and to do all such other and further things that in his judgment may be necessary to make such organization effective and within the limit of cost herein fixed; such reorganization shall be communicated to Congress at its next regular session and shall constitute for the fiscal year nineteen hundred and fourteen and until otherwise provided by Congress the permanent organization of the customs service." (34 Stat. 434.)

These very terms show that the act was an economy

measure pure and simple, designed to reduce the cost of collecting the customs by reducing the number of collectors. Obviously this implied the transfer of a certain amount of work (the work previously performed by the collectors whose dismissal was contemplated by the act) to the collectors who remained. No other inference could be drawn, for instance, from the provision that—

“ * * * in making such reorganization and reduction in expenses he is authorized *to abolish or consolidate* collection districts, ports, and subports of entry and delivery, *to discontinue needless offices* and employments,” etc.

This sort of thing has been done repeatedly before, as in the cases of the enlargement of the district of Hartford, Conn. (26 Stat. 467); the district of New York (20 Stat. 324; 28 Stat. 73); the port of New Orleans (25 Stat. 339; 29 Stat. 72; 37 Stat. 499); the district of Galveston (37 Stat. 213); and the port of Memphis (25 Stat. 790); and in none of these instances was it thought necessary to appoint new collectors.

My opinion is strengthened by the further consideration that the contrary construction would impute to Congress a purpose to oust substantially every collector in the country, suddenly, on July 1, and thereby to impede and disorganize the entire service and to require on that day a multitude of new appointments all subject to the delay of senatorial confirmation. There is nothing to indicate that Congress had such a purpose.

The fact that the President's order refers to these enlarged districts as “new” districts does not alter the real substance of the matter. Even were they technically “new” districts, they could still be filled by the President without confirmation by the Senate if Congress so directed (Const. II, 2); and, as I have stated, it is evident that Congress did not intend to require new appointments and confirmations. But, however this may be, I am of opinion that in substance the order did not abolish the positions but merely increased the duties of the collectors retained by giving them the work of those who were retired.

I am of opinion, therefore, as above stated, that the provisions of the order referred to were lawful.

Very respectfully,

J. C. McREYNOLDS.

To the SECRETARY OF THE TREASURY.

TRANSFER OF COMPLETED RECLAMATION PROJECTS TO
WATER USERS.

The Secretary of the Interior is not authorized by the reclamation act of June 17, 1902 (32 Stat. 388) to turn over the operation and maintenance of completed reclamation projects, in whole or in part, or to any extent, to water users' associations before the payment by such water users for water rights are made for the major portion of the lands irrigated by such works.

DEPARTMENT OF JUSTICE,

July 28, 1913.

SIR: Your letter of July 19, 1913, requests my opinion upon two questions of law arising in your department, viz:

"First. Is the Secretary of the Interior authorized by the reclamation act to turn over the operation and maintenance of completed reclamation projects, in whole or in part, or to any extent, to water users' associations before the payments by such water users for water rights are made 'for the major portion of the lands irrigated' by such works?

"Second. In case the Secretary of the Interior can lawfully turn over the operation and maintenance of such works to the waters users before the charges against the major portion of the lands are paid, can such waters users' associations employ labor in the operation and maintenance of such irrigation works for more than eight hours per day?"

Section 6 of the original reclamation act of June 17, 1902 (32 Stat. 388), provides:

"That the Secretary of the Interior is hereby authorized and directed to use the reclamation fund for the operation and maintenance of all reservoirs and irrigation works constructed under the provisions of this act: *Provided*, That when the payments required by this act are made for the major portion of the lands irrigated from the waters of any of the works herein provided for, then the management

and operation of such irrigation works shall pass to the owners of the lands irrigated thereby, to be maintained at their expense under such form of organization and under such rules and regulations as may be acceptable to the Secretary of the Interior: *Provided*, That the title to and the management and operation of the reservoirs and the works necessary for their protection and operation shall remain in the Government until otherwise provided by Congress."

I am not aware that the terms of this section, in so far as they bear upon the matter before me, have been altered by any subsequent act of Congress. Indeed, I find no other act which deals with the time when the title or management shall pass out of the Government, except the act of February 21, 1911 (36 Stat. 925), which authorizes the Secretary of the Interior to cooperate with waters users' associations and others in the construction of irrigation works, and which expressly provides:

"That the title to and management of the works so constructed shall be subject to the provisions of section six of said [reclamation] act."

By section 6, the duty and responsibility of maintaining and operating the reclamation works and of using and safeguarding the reclamation fund in so doing, are specifically laid upon the Secretary of the Interior. The second proviso declares that the management and operation of the reservoirs, and works necessary to protect and operate them, shall remain in the Government until otherwise provided by Congress itself. As for the other kinds of works, the time when the management and operation shall pass to the water users is expressly determined by the first proviso, namely, when the payments shall have been made for the major portion of the lands irrigated. Until that time arrives, the Secretary can not divest himself of any part of his responsibility for the management, maintenance, and operation of the works or the proper use of the fund.

This conclusion answers your first question in the negative and renders a reply to your second superfluous.

Respectfully,

J. C. McREYNOLDS.

TO THE SECRETARY OF THE INTERIOR.

EIGHT-HOUR LAW—PUBLIC HIGHWAY IN MINNESOTA.

The Federal statutes regulating the hours of labor do not apply to the improvement of selected roads over which rural delivery is or may be established as provided for under the provisions of the Post Office appropriations act of August 24, 1912 (37 Stat. 551).

DEPARTMENT OF JUSTICE,

July 31, 1913.

SIR: I have the honor to acknowledge the receipt of your letter of the 24th instant, inquiring whether any of the Federal statutes regulating hours of labor apply to work done in improving a public highway in the State of Minnesota under the provisions of the Post Office appropriation act approved August 24, 1912 (37 Stat. 552).

The act referred to appropriates \$500,000—

“ * * * to be expended by the Secretary of Agriculture, in cooperation with the Postmaster General, in improving the conditions of roads to be selected by them over which rural delivery is or may hereafter be established, such improvement to be for the purpose of ascertaining the increase in the territory which could be served by each carrier as a result of such improvement, the possible increase of the number of delivery days in each year, the amount required in excess of local expenditures for the proper maintenance of such roads, and the relative saving to the Government in the operation of the Rural Delivery Service and to the local inhabitants in the transportation of their products by reason of such improvement, and report the results in detail to Congress: *Provided*, That the State or the local subdivision thereof in which such improvement is made under this provision shall furnish double the amount of money for the improvement of the road or roads so selected. Such improvement shall be made under the supervision of the Secretary of Agriculture.”

Taking this provision as a whole, I think it may be said to authorize the actual work of road improvement contemplated to be done by the State or local municipality in which the road lies and to which it belongs, the Federal Government merely selecting the road to be improved and, through the Secretary of Agriculture, supervising the per-

formance of the work, the cost of the same to be defrayed as provided in the act.

If this course be followed, the Federal statutes regulating hours of labor will not apply. Laborers and mechanics engaged in such work will not be "employed by the Government of the United States," nor is a road so improved a "public work of the United States" within the meaning of the act of August 1, 1892 (27 Stat. 340), as amended by the act of March 3, 1913 (37 Stat. 726).

The act of June 19, 1912 (37 Stat. 137), would be also inapplicable. The contract for the work, which will involve the employment of laborers and mechanics, will be made by or on behalf of the State authorities, although the contract should of course provide that the work shall be done subject to the supervision of the Secretary of Agriculture. It will not, therefore, be a contract to which the United States is a party, nor will it be made "for or on behalf of the United States," within the meaning of that act. These latter words are merely used to cover contracts made by an officer or agent of the United States for or on its behalf, although the United States is not expressly made a party thereto. The fact that the United States is *interested* in the performance of a contract does not of itself make the contract one on behalf of the United States.

Of course, a different view would obtain if the United States itself constructed the improvement in question or contracted therefor, either directly or through one of its officers or agents.

Respectfully,

J. C. McREYNOLDS.

To the SECRETARY OF AGRICULTURE.

EIGHT-HOUR LAW—DRESSED MARBLE AND STONE FOR PUBLIC BUILDINGS.

The provisions of the eight-hour law of June 19, 1912 (37 Stat. 137), do not apply to the labor involved in the dressing of marble and stone for public buildings, such labor not being performed at the sites of the buildings themselves, since marble and stone clearly belong in their nature to articles or materials ordinarily

to be bought in the open market, although they may be dressed and finished in a manner peculiar to the needs of a particular building.

DEPARTMENT OF JUSTICE,

August 1, 1913.

SIR: I have the honor to acknowledge the receipt of your letters of the 25th of June and of the 25th ultimo, in which you inquire whether, in my opinion, the provisions of the eight-hour law, approved June 19, 1912 (37 Stat. 137), apply to the labor involved in the dressing of marble and stone for public buildings, such labor not being performed at the sites of the buildings themselves.

While the act of June 19, 1912, according to its first section, applies to every contract made by or on behalf of the United States, section 2 expressly excludes from the operation of the act contracts "for the purchase of supplies by the Government, *whether manufactured to conform to particular specifications or not,*" and contracts "for such materials or articles as may usually be bought in open market, * * * *whether made to conform to particular specifications or not.*" Therefore, where an article or a material belongs to a class which may ordinarily be bought in open market, the act by its very terms excludes it from the operation of the law, no matter to what extent it may be individualized and distinguished by the requirements of the particular specifications under which the contract is executed.

Marble and stone clearly belong in their nature to articles or materials ordinarily to be bought in the open market, and they are therefore, in my judgment, excluded from the operation of the act, although they may be dressed and finished in a manner peculiar to the needs of a particular building. This was the distinct holding of my immediate predecessor, Mr. Wickersham, in his opinions to the President for the use of the Public Printer (30 Op. 24), and to the Secretary of the Treasury (30 Op. 31), and I think that the conclusions reached in those two opinions are correct.

That this view was taken by the persons who were responsible in the House of Representatives for this legislation appears from the statement of Mr. Wilson of Pennsylvania,

who had charge of the bill in that body (Cong. Rec., 62d Cong., 2d sess., vol. 48, p. 382) :

"Mr. MADDEN. Suppose, for example, a man had a contract to construct a building which would require a lot of rough stone or brick and also a lot of cut stone finished. He could go out in the open market, or anybody could, and buy the raw material, and he could get it in the open market, but he could not go into the market and buy the finished material, the dressed material, because dressed material would have to be made in accordance with the provisions of the specifications under the contract; so that I take it that the bill would require the finished material to be made in accordance with the provisions of this law, while the rough material which might enter into the construction of a building would not be so required.

"Mr. WILSON of Pennsylvania. *My judgment is that finished material would be simply material they have bought in the open market under certain specifications, and it would be exempt from the operation under this clause of the bill.*"

Respectfully,

J. C. McREYNOLDS.

TO THE SECRETARY OF THE TREASURY.

EXPORTATION OF CLOTHES AND PROVISIONS TO MEXICO.

Clothes and provisions are not munitions of war within the meaning of the amended joint resolution of March 14, 1912 (37 Stat. 630), prohibiting the export of arms or munitions of war to any American country in which, according to the President's proclamation, conditions of domestic violence exist which are promoted by the use of such materials.

DEPARTMENT OF JUSTICE,

August 11, 1913.

SIR: On the 5th instant you transmitted to me a letter from the commanding officer at Marfa, Tex., to the commanding general of the Southern Department, with the indorsement of the latter thereon, and a copy of an opinion by the Acting Judge Advocate General, all relating to an alleged exportation of clothes and provisions to Mexico,

destined, as the evidence indicates, for the use of the insurgents in that country. This fact, however, does not appear from the nature or character of the articles themselves but from the evidence *abunde*.

My opinion is desired as to whether or no these articles are "munitions of war" within the meaning of the joint resolution approved March 14, 1912 (37 Stat. 630), amending the joint resolution relating to "coal or other material used in war" approved April 22, 1898 (30 Stat. 739). The amended resolution prohibits the export of "arms or munitions of war" to any country in which, according to the President's proclamation, conditions of domestic violence exist which are promoted by the use of such materials.

The question is not free from difficulty, since the meaning of the phrase "munitions of war" must vary considerable with the conditions of warfare in general and in the particular instance in question. In my judgment, however, neither provisions nor ordinary, as distinguished from military, clothing fall within the category of "munitions of war."

From the language of writers on international law, of statesmen, and of the courts it is clear that "munitions of war" is not interchangeable with "contraband of war," but has a more limited meaning. "Munitions" are more closely connected with actual warfare than "contraband," which latter term includes nearly everything which a belligerent may reasonably think renders aid and comfort to the enemy. Yet the discussion of the meaning of "contraband" in the authorities indicates the true scope of the phrase "munitions." In *The Peterhoff*, 5 Wall. 28, 58, Chief Justice Chase, speaking for the court, defined "contraband" and made a practical application of his definition, as follows:

"The classification of goods as contraband or not contraband has much perplexed text writers and jurists. A strictly accurate and satisfactory classification is perhaps impracticable; but that which is best supported by American and English decisions may be said to divide all merchandise into three classes. Of these classes, the first consists of articles manufactured and primarily and ordinarily used for military purposes in time of war; the second, of

articles which may be and are used for purposes of war or peace, according to circumstances; and the third, of articles exclusively used for peaceful purposes. Merchandise of the first class, destined to a belligerent country or places occupied by the army or navy of a belligerent, is always contraband; merchandise of the second class is contraband only when actually destined to the military or naval use of a belligerent; while merchandise of the third class is not contraband at all, though liable to seizure and condemnation for violation of blockade or siege.

"A considerable portion of the cargo of the *Peterhoff* was of the third class and need not be further referred to. A large portion, perhaps, was of the second class, but is not proved, as we think, to have been actually destined to belligerent use, and can not therefore be treated as contraband. Another portion was, in our judgment, of the first class, or, if of the second, destined directly to the rebel military service. This portion of the cargo consisted of the cases of artillery harness and of articles described in the invoices as 'men's army bluchers,' 'artillery boots,' and 'Government regulation gray blankets.' These goods come fairly under the description of goods primarily and ordinarily used for military purposes in time of war. They make part of the necessary equipment of an army."

In my opinion, it is the first class of contraband, namely, "articles manufactured and primarily and ordinarily used for military purposes in time of war," to which the phrase "munitions of war" is limited. This is the sense in which Hall evidently used it throughout his discussion of "contraband" in Chapter V of his *Treatise on International Law*, and to the same effect is Wheaton as quoted in *Moore's Digest*, vol. 7, p. 662.

The act of July 6, 1812, construed in *United States v. Sheldon*, 2 Wheat. 119, made unlawful the transportation to Canada of "naval or military stores, arms or *munitions of war, or any article of provisions*," showing that Congress did not at that time consider provisions as included in "munitions of war." In *Mrs. Alexander's Cotton*, 2 Wall. 404, 420, the Supreme Court, while intimating that cotton was contraband under the conditions of the Civil War, distinguishes it from "munitions," saying:

" * * * It is well known that cotton has constituted the chief reliance of the rebels *for means to purchase the munitions of war in Europe.* * * *"

For the same reason even money may be contraband (*United States v. Dieckelman*, 92 U. S. 520, 526).

All of our treaties which deal with contraband at all have endeavored to limit the scope of the term to those articles which are manufactured and used primarily for warfare. For example, Article XVIII of the treaty with Mexico of 1831 (Malloy, Vol. I, p. 1090) first specifies as contraband certain articles, as guns, powder, armor, military clothes, and concludes "and generally all kinds of arms, and instruments of iron, steel, brass, and copper, or of any other materials, *manufactured, prepared, and formed expressly to make war by sea or land.*" This same language is contained in Article XIV of the treaty with Chile of 1832 (Malloy, Vol. I, p. 175), and of this treaty Mr. Blaine when Secretary of State said that it "restricted contraband to implements and munitions of war" (7 Moore's Dig. p. 663). The phrase "munitions of war" was used in the same sense by Mr. Cass when Secretary of State (7 Moore, 661) and by the British Secretary for Foreign Affairs (7 Moore, 666).

These conclusions are strengthened by considerations of humanity, and where the meaning of the joint resolution is ambiguous these should have weight. That portion of the population of Mexico which is noncombatant has also its rights. "Munitions of war," taken in the strict sense herein adopted, are essential to the continuance of armed warfare in Mexico. But it is inconceivable that the nonimportation from this country of food and ordinary clothing will bring the insurrection to an end or seriously hamper it, while such nonimportation might possibly cause suffering to the noncombatant population without any equality of advantage to the Government.

The same conclusion, it would seem, was reached by Attorney General Wickersham (29 Op. 375), and to the general views expressed by him I adhere.

I have the honor to be, your obedient servant,

J. C. McREYNOLDS.

To the SECRETARY OF WAR.

DIVERSION OF WATER FROM NIAGARA RIVER.

Any diversion of water from the Niagara River on the American side in such quantity as substantially to interfere with the navigable capacity of that river or the connected lakes, or which in any substantial degree alters or modifies the course, location, or channel of either of those waterways, is prohibited by section 10 of the river and harbor act of March 3, 1899 (30 Stat. 1151), unless in advance recommended by the Chief of Engineers and authorized by the Secretary of War.

Under the treaty proclaimed May 13, 1910 (36 Stat. 2448), between the United States and Great Britain relating to boundary waters between the United States and Canada, the authority of the President is not limited to the prevention of interference with navigation, but extends to the regulation or supervision of diversions for power purposes within a daily maximum, in the aggregate, of 20,000 cubic feet of water per second, and to the prevention of any diversion whatever for such purposes in excess of that maximum.

In the absence of legislation by Congress, the President may not only prohibit the importation of electrical power to this country from Canada, but may also grant permission therefor subject to such conditions as to him may seem good.

DEPARTMENT OF JUSTICE,

August 14, 1913.

SIR: I have the honor to reply to your letter of June 19, 1913, desiring my opinion on certain questions concerning the Niagara River.

You inquire as to your authority under any existing act of Congress or under Article V of the treaty proclaimed May 13, 1910 (36 Stat. 2448), between Great Britain and the United States to control the amount and manner of diversions of water for power purposes on the American side of the river; and whether under the treaty you may restrict the quantity to be diverted for such purposes to less than the maximum limit authorized therein.

Aside from the treaty, the only provision of existing law applicable to the case is section 10 of the river and harbor act approved March 3, 1899 (30 Stat. 1121, 1151), which provides that—

“ * * * it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits

of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of War prior to beginning the same."

I am of opinion that under this law any diversion of water from the Niagara River in such quantity as substantially to interfere with the navigable capacity of that river or the connected lakes, or which in any substantial degree alters or modifies the course, location, or channel of either of those waterways, is prohibited unless in advance recommended by the Chief of Engineers and authorized by the Secretary of War. Whether any particular diversion amounts to a substantial interference with navigation is a question of fact to be determined in the first instance by the officials named and while their conclusion is doubtless not final, yet it would certainly be very persuasive if appealed from.

Any such prohibited diversions that may be discovered should be reported to this Department, whose duty it will be to stop and prevent them by injunction or by criminal prosecution under section 12 of the same act.

Under the treaty your authority is not limited to the prevention of interference with navigation, but extends to the regulation or supervision of diversions for power purposes within a daily maximum, in the aggregate, of 20,000 cubic feet of water per second, and to the prevention of any diversion whatever for such purposes in excess of that maximum.

The treaty provision is as follows:

"ARTICLE V.

"The High Contracting Parties agree that it is expedient to limit the diversion of waters from the Niagara River so that the level of Lake Erie and the flow of the stream shall not be appreciably affected. It is the desire of both Parties to accomplish this object with the least possible injury to investments which have already been made in the construction of power plants on the United States side of the river under grants of authority from the State of New York, and on the Canadian side of the river under

licenses authorized by the Dominion of Canada and the Province of Ontario.

"So long as this treaty shall remain in force, no diversion of the waters of the Niagara river above the Falls from the natural course and stream thereof shall be permitted except for the purposes and to the extent hereinafter provided.

"The United States may authorize and permit the diversion within the State of New York of the waters of said river above the Falls of Niagara, for power purposes, not exceeding in the aggregate a daily diversion at the rate of twenty thousand cubic feet of water per second.

"The United Kingdom, by the Dominion of Canada, or the Province of Ontario, may authorize and permit the diversion within the Province of Ontario of the waters of said river above the Falls of Niagara, for power purposes, not exceeding in the aggregate a daily diversion at the rate of thirty-six thousand cubic feet of water per second.

"The prohibitions of this article shall not apply to the diversion of water for sanitary or domestic purposes, or for the service of canals for the purposes of navigation."

That the subject matter of this treaty, namely, the regulation of the boundary waters between this country and Canada, being, by its very nature, beyond the competency either of Congress or the States, is one peculiarly within the treaty making power as always been understood, can not be doubted (22 Op. 214). Accordingly, the treaty is part of the "supreme law of the land" and has the same force and effect and is to be carried out in the same manner as an act of Congress expressed in like terms. (*Ware v. Hylton*, 3 Dall. 199, 277, 281.) As said by Mr. Justice Miller in the *Head Money Cases*, 112 U. S. 580, 598, 599: " * * * A treaty, then, is a law of the land as an act of Congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined. And when such rights are of a nature to be enforced in a court of justice, that court resorts to the treaty for a rule of decision for the case before it as it would to a statute."

It is true that in some cases, owing to the fact that the treaty provides for or contemplates some further action by

the legislative department of the Government an act of Congress may be necessary before the provisions of the treaty can be effectively carried out (*Foster v. Neilson*, 2 Pet. 253; *Turner v. American Baptist Missionary Union*, 5 McLean, 344, 347), but in my judgment the provisions of this treaty relating to the diversion of water from the Niagara River were intended to operate presently and additional legislation is not necessary. An appropriate act of Congress might merely repeat the language of the treaty and certainly it would be your duty to enforce by all appropriate means an act of Congress drawn in these terms. I can see no valid distinction between the provision now in question and those provisions of other treaties which have been held by high authority to be self-executing. (*United States v. Percheman*, 7 Pet. 51, Marshall, C. J.; *United States v. 43 Gallons of Whiskey*, 93 U. S. 188, 196; *The British Prisoners*, 1 Woodbury & Minot 66; 4 Op. 201, 209, 210; *Geofroy v. Riggs*, 133 U. S. 258.)

In thus executing the treaty you may use any of the agencies ordinarily adopted for the execution of the laws of the United States. You may invoke the aid of the courts, or you may employ directly the administrative officers of the United States, or the military forces thereof. As was said by Mr., afterwards Chief Justice, Marshall, in arguing the case of Jonathan Robbins in the House of Representatives, *Annals of Congress*, Sixth Congress, 614:

“The treaty, which is a law, enjoins the performance of a particular object. The person who is to perform this object is marked out by the Constitution, since the person is named who conducts the foreign intercourse, and is to take care that the laws be faithfully executed. The means by which it is to be performed, the force of the nation, are in the hands of this person. Ought not this person to perform the object, although the particular mode of using the means has not been prescribed? Congress, unquestionably, may prescribe the mode, and Congress may devolve on others the whole execution of the contract; but, till this be done, it seems the duty of the executive department to execute the contract by any means it possesses.”

I am of the opinion, therefore, that it is your duty to interfere with any diversion within the State of New York

of the waters of the Niagara River above the Falls of Niagara, for power purposes, exceeding a daily maximum, in the aggregate, of 20,000 cubic feet of water per second. If that maximum be not exceeded, the terms of the treaty are, as between the high contracting parties, satisfied. The stipulation, however, that "the United States may authorize and permit" the diversion of waters to that extent, clearly places the subject, in the absence of legislation by Congress to the contrary, under your supervision, to the end that the maximum may not be exceeded.

You further inquire whether under existing law you have any authority to control the importation into this country from Canada of electric current generated by water power from the Niagara River.

In my opinion the lapse of the Burton Act (34 Stat. 626), which contained the only direct legislation regarding the transmission of electricity from Canada, has left you free to control the matter under your plenary power to prevent any physical connection (not authorized by Congress) between any foreign country and the United States.

The executive power (subject, of course, to affirmative control by Congress) has been recognized as controlling the laying of cables between the United States and foreign countries (22 Op. 13, 408, 514; 29 Op. 579, 583), and in the only case in court upon the subject *United States v. La Compagnie Francaise des Cables Telegraphiques*, 77 Fed. 496) Judge Lacombe expressed as follows the same opinion, though in that particular case he refused a *preliminary* injunction on the ground that the cable had already been laid.

"It is thought that the main proposition advanced by complainant's counsel is a sound one, and that, without the consent of the General Government, no one, alien or native, has any right to establish a physical connection between the shores of this country and that of any foreign nation. Such consent may be implied as well as expressed, and whether it shall be granted or refused is a political question, which, in the absence of congressional action, would seem to fall within the province of the Executive to decide. As was intimated upon the argument, it is further thought

that the Executive may effectually enforce its decision without the aid of the courts. * * *

The principle has been acted upon frequently in our dealings with foreign nations (*Moore Dig. of International Law*, Vol. II, pp. 463, 466), and may now be regarded as firmly established.

These authorities are applicable to the present subject, and in the absence of legislation by Congress you may not only prohibit the importation of electrical power to this country from Canada, but may also grant permission therefor subject to such conditions as to you may seem good.

Very respectfully,

J. C. McREYNOLDS.

TO THE PRESIDENT.

FOOD AND DRUGS ACT—VARIATIONS, TOLERANCES, AND
EXEMPTIONS.

Under the food and drugs act of June 30, 1906 (34 Stat. 768), as amended by the act of March 3, 1913 (37 Stat. 732), administrative rules are to be promulgated specifically defining (1) reasonable variations, (2) tolerances as to large packages, (3) exemptions as to small, the line between large and small packages to be determined by the three Secretaries.

DEPARTMENT OF JUSTICE,
August 25, 1913.

SIR: Your question submitted to me by your letter of the 11th instant in regard to the amendment of March 3, 1913 (37 Stat. 732), to paragraph third of section 8 of the food and drugs act of June 30, 1906 (34 Stat. 768), is one peculiarly requiring the rule that a construction of a statute shall not stick in the letter but shall conform to the true spirit and intent of the act, if that can in any way be gathered from its language.

The amended act provides that an article shall be deemed to be misbranded, in the case of food:

“Third. If in package form, the quantity of the contents be not plainly and conspicuously marked on the outside of the package in terms of weight, measure, or numerical count: *Provided, however,* That reasonable variations shall

be permitted, and tolerances and also exemptions as to small packages shall be established by rules and regulations made in accordance with the provisions of section three of this act."

It is claimed that, owing to the absence of a comma after the words "tolerances" and "packages," the rules and regulations provided for may only establish tolerances and exemptions as to *small packages*. This construction, however, in my judgment, would not conform to the plain intent of the act. It is evident that "tolerances" are just as necessary in the case of large packages as in the case of small. Indeed, there would seem to be little room for tolerances in the case of small packages. As to them, exemption would be the natural remedy for the strictness of the act. I, therefore, read the statute in this wise.

"Provided, however, That reasonable variations shall be permitted by rules and regulations made in accordance with the provisions of section three of this act, and tolerances, and also exemptions as to small packages, shall be established by like rules and regulations."

That is, administrative rules are to be promulgated specifically defining (1) reasonable variations, (2) tolerances as to large packages, (3) exemptions as to small, the line between large and small packages to be determined by the three secretaries.

This view is borne out by the legislative history of the act. The act as originally introduced in the House (H. R. 22526) stated the proviso of the third paragraph as follows (Cong. Rec., 62d Cong., 2d sess., p. 10235) :

"Provided, however, That reasonable variations shall be permitted, and tolerances shall be established by rules and regulations made in accordance with the provisions of this act, which shall not in the average reduce the weight, measure, or numerical count below that marked on said package."

This proviso, like that in the approved act, may be construed to provide for rules and regulations as to reasonable variations, and as to tolerances for all packages, large and small, but contains no provisions as to exemptions.

The Senate amended the proviso in question so as to read as follows (Cong. Rec., 62d Cong., 3d sess., p. 3503) :

224 *Entry of Wood Pulp Shipped from Norway.*

"Provided, however, That the Secretary of Agriculture is authorized to establish rules and regulations permitting reasonable variations where in his judgment exactness is impracticable, and shall keep a record thereof: Provided further, That the provisions of this paragraph shall not apply to articles in packages or containers when the retail price of such articles is six cents or less."

The Senate amendment, it will be noted, provides for rules and regulations permitting reasonable variations generally, and expressly exempts small packages, but contains no provision as to tolerances.

The conference recommended as a compromise the act in its present form (Cong. Rec., 62d Cong., 3d sess., p. 4559), and the conference reports were agreed to.

The differences between the two houses compromised by the approved act were these. The House wanted rules and regulations as to both reasonable variations and tolerances, but did not desire exemptions. The Senate wanted exemptions as to small packages and regulations only as to reasonable variations. The approved act retained the House provision as to regulations for both reasonable variations and tolerances, and modified the Senate provision as to exemptions by making them also the subject of rules and regulations instead of granting them as a matter of law.

I have the honor to be, your obedient servant,

J. C. McREYNOLDS.

TO THE SECRETARY OF AGRICULTURE.

ENTRY OF WOOD PULP SHIPPED FROM NORWAY.

Wood pulp shipped to the United States from Norway on through bills of lading but transshipped en route at Rotterdam is entitled to free entry by virtue of the favored-nation clause in the subsisting treaty between the United States and Norway, provided such wood pulp is the product of Norway, and otherwise conforms to the conditions prescribed by section 2 of the so-called Canadian Reciprocity Act of July 26, 1911 (37 Stat. 11).

Such transshipment merely for transportation purposes does not prevent the goods from being "imported directly" from Norway "into the United States" within the meaning of the act.

DEPARTMENT OF JUSTICE,

September 4, 1913.

SIR: I have the honor to reply to your letter of August 28, 1913, requesting my opinion on the following question:

"Whether wood pulp shipped to the United States from Norway on through bills of lading but transshipped en route at Rotterdam would be entitled to entry free of duty under the decision of the United States Court of Customs Appeals rendered on May 12, 1913, published in T. D. 33434."

I am of opinion that such wood pulp is entitled to free entry, assuming, of course, that it is the product of Norway and otherwise conforms to the conditions prescribed by section 2 of the act of July 26, 1911 (37 Stat. 11). In this I agree with the opinion of the Acting Solicitor of the Treasury, dated August 18, 1913.

The point presented for consideration is whether such goods are "imported therefrom [i. e., from Norway] directly into the United States" within the meaning of the statute referred to.

Certainly this importation is "direct" in the commercial sense, for there is no intervening commercial transaction. Also, it is "direct" in the transportation sense, for the goods arrive under through bill of lading, without other pause than that incident to the necessities or conveniences of transportation. And it is "direct" within the common policy of our customs and reciprocity laws, by which, having originated in Norway and having been from the first destined to this country, the goods would be considered as imported from Norway and not from Holland (*United States v. Luyties*, 130 Fed. 333, C. C. A. 2d C.; *Millar v. Millar*, 17 Fed. Cas. No. 9546; *Re Booth*, T. D. 338; *Grant v. Peaslee*, 9 Fed. Cas. No. 5212; *Griswold v. Maxwell*, 11 Fed. Cas. No. 5838; *Re Leerburger*, T. D. 25510; *Re Hermann Brothers*, T. D. 22447), always with the qualification that they have not entered the commerce of the intervening country (*Re La Montagne*, T. D. 21565; *Acker, Merrill & Condit v. United States*, T. D. 31481).

Even under the old "direct-trade" statutes (e. g. act Mar. 3, 1865, sec. 6, and act June 6, 1872, sec. 3) it was

ruled by the Secretary of the Treasury that the words "directly imported" did not require the transportation to be accomplished entirely in a single bottom (T. D. 225), though they did exclude any commercial pause in the intermediate country (T. D. 1862; *Powers v. Comly*, 101 U. S. 789).

The closest analogy to the present case is the decision of the Court of Customs Appeals in *United States v. United Cigar Stores Co.*, T. D. 31505 (affirming T. D. 30643). The statute there construed (sec. 5, act Aug. 5, 1909) provided that certain privileges of free entry should be granted goods of the Philippines coming by "direct shipment from the country of origin to the country of destination," and the court held that the condition was satisfied by a shipment *bona fide* on through bill of lading, even though there was transshipment at Hongkong. In reaching this conclusion the court said:

"'Direct shipment' means no more than 'directly imported,' and if Philippine products invoiced for the United States on a through bill of lading have been so transshipped as not to permit of their commingling en route with the commerce of any other country, the condition for direct shipment has been fulfilled according to the purpose and meaning of the statute. (T. D. 31505.)"

I perceive no distinction between these authorities and the present case unless there is some peculiarity of purpose in the present act which would require the other construction, as for instance a purpose to foster steamship lines between the country of production and the United States rather than between the intermediate country and the United States. It is evident, however, that no such purpose existed. Indeed, it would hardly be applicable to traffic with Canada (which is the only traffic especially dealt with by the act), for that is conducted mainly by rail. In fact, the real purposes of Congress are well understood to have been (1) to take a step toward reciprocity, and (2) to obtain a supply of pulp wood on favorable terms. Neither of these purposes would be furthered in any degree by putting the unusual interpretation on the words "imported directly," but on the contrary they re-

quire the interpretation I have given, in order to permit a fair and equitable operation.

It is evident that the clause was inserted as a precaution against abuse of the privilege or its use on behalf of countries other than that of production, as was the intention of the similar clause in the Philippine case (T. D. 30643, p. 554).

For these reasons I am of opinion, as above stated, that a transshipment at Rotterdam, of a merely transportation character not constituting any commercial interruption in the journey, would not prevent these goods from being "imported directly" from Norway.

Very respectfully,

WINFRED T. DENISON,

Assistant Attorney General.

Approved:

JNO. W. DAVIS,

Acting Attorney General.

To the SECRETARY OF THE TREASURY.

EXPORTATION OF HORSES, RIDING SADDLES, ETC., TO MEXICO.

Ordinary, as distinguished from military, riding saddles, stirrups, girths, hay and other food stuffs, and horses are not munitions of war within the meaning of the amended joint resolution of March 14, 1912 (37 Stat. 630), prohibiting the export of "arms or munitions of war" to any American country in which, according to the President's proclamation, conditions of domestic violence exist which are promoted by the use of such materials.

Opinion of April 20, 1912 (29 Op. 394), dissented from.

DEPARTMENT OF JUSTICE,

October 6, 1913.

SIR: I have the honor to acknowledge the receipt of your letter of the 2d instant inquiring whether riding saddles, stirrups, girths, hay and other food stuffs, and horses, intended for the Mexican federal army or for other parties, are "munitions of war," within the meaning of the joint resolution approved March 14, 1912 (37 Stat. 630), which prohibits the export of "arms or munitions of war" to any

country in which, according to the President's proclamation, "conditions of domestic violence exist which are promoted by the use of" such materials.

In my opinion to the Secretary of War of August 11th last (30 Op. 213) it was stated that the term "munitions of war" was not interchangeable with "contraband of war," but was confined to "articles manufactured and primarily and ordinarily used for military purposes in time of war." This definition would evidently exclude the articles to which you refer, as they are all plainly of a doubtful, and not primarily military, character.

It is true that in treaties and in declarations of the political department of nations, from time to time, horses and their equipment have been designated as absolutely contraband. While such public acts throw a light on the meaning of "contraband" as a matter of international law and are, indeed, binding as municipal law upon the courts of the countries whose political departments have so declared, it must not be forgotten that the question here involved is not one of international law, but of the intent of Congress, as expressed in the phrase "munitions of war" in the joint resolution. The authorities quoted in Attorney General Wickersham's opinion in 29 Op. 375 and in my opinion, *supra*, show that this term has always been used by responsible persons in a sense akin to "arms," and that it can not be stretched to include horses and their equipage.

In addition to the authorities quoted in the two opinions just referred to I may be permitted to refer to Book III, Tit. IX, Art. 11 of the Ordonnance de la Marine of France of 1681, which directs confiscation of "*les armes, poudres, boulets et autres munitions de guerre, même les chevaux et équipages* qui seront transportés pour le service de nos ennemis," and of this inclusion of horses and their equipage in "contraband of war," Valin in his Commentary on the Ordonnances, as quoted in 3 Phill. (2d ed.) 448, remarks "*parceque cela a beaucoup d'analogie avec les munitions de guerre.*" Phillimore himself evidently construes "munitions of war" in a limited sense (3 Phill. [2d ed.] 405); so does Halleck (Vol. II, 3 Eng. ed., § 20); so apparently

does Oppenheim (Vol. II, §§ 392, 393), and the Naval War Code of the United States of 1901, while stating by Art. 36 that horses and mules are absolutely contraband, provides in Art. 24 as follows:

“ART. 24. The term ‘contraband of war’ includes only articles having a belligerent destination and purpose. Such articles are classed under two general heads:

“(1) Articles that are primarily and ordinarily used for military purposes in time of war, such as arms and *munitions of war*, military material, vessels of war, or instruments made for the immediate manufacture of *munitions of war*.

“(2) Articles that may be and are used for purposes of war or peace, according to circumstances.”

The English rule, apart from treaties and proclamations, was that horses were not absolute contraband under international law. (Boyd's Wheaton, p. 651, Oppenheim, Vol. II, p. 424, citing Holland's Prize Law, § 62.)

I am satisfied that the term “munitions of war” should not be extended beyond the plain definition expressed in my opinion of August 11. Outside of that limit you approach a debatable field where the articles are not clearly designed to “promote domestic violence,” where there is a possibility of confusion in the minds of administrative officers and, perhaps, the adoption of inquisitorial methods, and where no line can logically be drawn short of practical nonintercourse with Mexico, a thing I am sure Congress did not intend. And for these reasons the particular designation of the articles, while important in determining their character as contraband, does not offer a safe guide to their character as “munitions of war,” a character which, in my judgment, must be fastened upon them by the inherent nature of the articles themselves.

These conclusions constrain me to dissent from the opinion of Attorney General Wickersham of April 20, 1912 (29 Op. 394), to the effect that ordinary, as distinguished from military, saddles and bridles are “munitions of war.” This conclusion was probably largely based on the Declaration of London of 1909 (see 29 Op. 377, 378) defining absolute contraband and, as indicated above, I do

not think such a declaration a correct guide to the meaning of the term "munitions of war" in the joint resolution of Congress. I have the honor to be,

Your obedient servant,

J. C. McREYNOLDS.

TO THE SECRETARY OF THE TREASURY.

INCOME TAX—BONDS HELD BY NONRESIDENT FOREIGNERS.

Section 2, paragraph A, subdivision 1, of the tariff act of October 3, 1913, does not lay a tax upon the interest accruing on bonds executed by a resident or citizen of the United States when held and owned by a nonresident foreigner, and this is true irrespective of whether they are unsecured or secured by a mortgage upon real estate in this country, and also irrespective of where the written bonds are in fact kept or interest payments thereon are made.

DEPARTMENT OF JUSTICE,

October 23, 1913.

SIR: I have the honor to reply to your letter of October 16, wherein you ask concerning the application which you should give to the language quoted below from Section II, Paragraph A, subdivision 1, of the tariff law of October 3, 1913:

"That there shall be levied, assessed, collected and paid annually upon the entire net income arising or accruing from all sources in the preceding calendar year to every citizen of the United States, whether residing at home or abroad, and to every person residing in the United States, though not a citizen thereof, a tax of 1 per centum per annum upon such income, except as hereinafter provided; and a like tax shall be assessed, levied, collected, and paid annually upon the entire net income from all property owned and of every business, trade, or profession carried on in the United States by persons residing elsewhere."

In substance, you wish to be advised whether, in pursuance of this paragraph, the regulations which you are about to promulgate should direct the levying, assessing, and collecting of a tax upon the interest accruing upon bonds executed by a resident or citizen of the United States, whether secured by a mortgage or no, when such bonds

are held or owned by a citizen or resident of a foreign country. Also, whether this tax should be levied upon the interest thereon where bonds executed by a nonresident foreigner, and secured by a mortgage on real estate in the United States, are held and owned by another nonresident foreigner.

I am of opinion that the quoted provision does not lay a tax upon the interest accruing on bonds of the character specified when held and owned by a nonresident foreigner, and that this is true irrespective of whether they are unsecured or secured by a mortgage upon real estate in this country, and also irrespective of where the written bonds are in fact kept or interest payments thereon are made.

Respectfully, J. C. McREYNOLDS.
TO THE SECRETARY OF THE TREASURY.

DRAWBACK ON ARTICLES SHIPPED FROM THIS COUNTRY
TO GUAM AND TUTUILA.

The Secretary of the Treasury may not authorize a drawback on articles shipped from this country to Guam and Tutuila under section 25 of the tariff act of August 5, 1909 (36 Stat. 90).

DEPARTMENT OF JUSTICE,
November 6, 1913.

SIR: Owing to a communication from the secretary of the foreign trade department of the San Francisco Chamber of Commerce requesting certain action by you, you ask, under date of September 8 last, my opinion as to whether, under section 25 of the Payne-Aldrich Tariff Act of August 5, 1909 (36 Stat. 11, 90), you may authorize the payment of drawback on articles shipped from this country to Guam and Tutuila.

The said act, by section 1, provides for a certain rate of duty "upon all articles imported from *any foreign country* into the United States or into any of its *possessions (except the Philippine Islands and the islands of Guam and Tutuila)*." Section 5 contains provisions specifically regulating the duties *between this country and the Philippine*

Islands. Section 23 exempts from duty goods made and manufactured in bonded warehouses for exportation "to foreign countries or to the Philippine Islands." Section 25—the one to which you particularly refer—provides for a drawback of duties "*on the exportation of*" articles in the manufacture of which imported materials have been used, to the extent of the duties paid on such materials.

It is conclusively determined that Guam and Tutuila are not "foreign countries" within the meaning of our tariff acts. (*Faber v. United States*, 221 U. S. 649, 658, and cases there cited; 23 Op. 629.) It is equally well settled that the terms "export" and "import" refer primarily to foreign countries (*Woodruff v. Parham*, 8 Wall. 123, 136; *Faber v. United States*, *supra*, p. 659; 23 Op. 418; 28 ib. 422).

It follows necessarily that the provision of section 25 of the act of August 5, 1909, which allows drawback "*on the exportation*" of articles manufactured or produced in the United States from imported materials can not apply to articles shipped to Guam or Tutuila. The whole theory of the drawback provisions of the customs laws, and of the Treasury regulations made in pursuance thereof, is that the goods are to be "exported" to "foreign countries," to countries "out of the jurisdiction of the United States." The decision in *Swan and Finch Co. v. United States* (37 Ct. Cls. 101; s. c., 190 U. S. 143) is decisive as to the meaning of "exportation" in connection with drawbacks, and the term "exportation" has the same meaning in the laws relating to bonded warehouses (23 Op. 418).

It may be claimed with some persuasiveness that since Guam and Tutuila are, under section 1 of the Payne-Aldrich Act, permitted, like the Philippines, to make their own tariff on articles imported into those islands from foreign countries, and since, by various provisions of law, the drawback and bonded warehouse privileges are granted to shippers from this country to the Philippines, therefore the Payne-Aldrich Act should be liberally construed so as to extend the same privileges to shippers to Guam and Tutuila. It is sufficient, however, to say that to insert into a tariff act, and make applicable to two territories in the

peculiar relation to this country of Guam and Tutuila, a body of provisions on a subject like drawbacks and bonded warehouses would be legislation, not construction, and especially so when it could only be done by giving an interpretation to the terms "foreign countries" and "exportation" entirely contrary to that repeatedly sanctioned by the Treasury Department and by the Supreme Court, and might bring about unforeseen evil results in the general administration of the customs laws. As was said by Acting Attorney General Richards in 23 Op. 418, 421:

"* * * conceding that the principle of assured removal from consumption in this country free of tax or duty, in order to increase the market for our goods, and with a view to international comity, embraces the case of supplies which are manufactured in this country and are delivered to foreign war vessels quite as clearly as such supplies which are imported; nevertheless the law has carried this principle into effect in the latter case, and has not done so in the former case. It is a well-established rule, having few exceptions (*Union Ins. Co. v. United States*, 6 Wall. 759; *McKee v. United States*, 164 U. S., 287), that it is not permissible to add to, change, or subtract from the words of a law under the guise of construction: 'No mere omission, no mere failure to provide for contingencies which it may seem wise to have specifically provided for, justify any judicial addition to the language of the statute.' (*United States v. Goldenberg*, 168 U. S., 95, 103)." * * *

So Attorney General Knox, in 25 Op. 128, 131, said:

"Guam has been left by Congress in an anomalous situation, but it is not for the Executive to supply by interpretation and construction any legislative requirements."

Moreover, even if the language of the Payne-Aldrich Act on the subject of drawbacks on shipments to Guam and Tutuila were more doubtful than in my opinion it is, yet, since a drawback is an exemption from the ordinary tariff duties, such doubt must be resolved against the privilege claimed. In *United States v. Allen* (163 U. S. 499, 504), a case involving a claim of drawback, the court said:

“ * * * The claim advanced is that an exceptional privilege or exemption from the general operation of a law exists in favor of the defendant in error. Such a claim is within the general principle that exemptions must be strictly construed, and that doubt must be resolved against the one asserting the exemption. *Schurtz v. Cook*, 148 U. S. 397; *Keokuk & Western Railroad v. Missouri*, 152 U. S. 301, 306.”

To the same effect is *Swan and Finch Co. v. United States*, *supra*, pp. 146, 147. And in *Cornell v. Coyne* (192 U. S. 418, 432), the court, after stating the above rule that a claim of exemption or privilege must be construed strictly against the claimant, concluded as follows:

“ Why Congress should grant an exemption from manufacturing tax in the case of exported tobacco and not in the case of exported filled cheese, is not for us to determine. Doubtless the reasons which prompted such difference were satisfactory. *It is enough that no exemption has been made in favor of the latter.*”

I have the honor to be,

Your obedient servant,

J. C. McREYNOLDS.

To the SECRETARY OF THE TREASURY.

DETAIL OF STAFF OFFICERS OF MARINE CORPS TO DUTY
OUTSIDE OF WASHINGTON.

Article 4141 of the Navy Regulations, approved May 14, 1913, in that it permits officers of the staff departments of the Marine Corps to be detached permanently from the headquarters of the command and gives the power to the commandant of the corps to impose duties upon these staff officers inconsistent with their staff functions, is in contravention of existing statutes, and is, therefore, invalid.

DEPARTMENT OF JUSTICE,

November 25, 1913.

SIR: In your letter to me of the 25th of October, you request my opinion whether article 4141 of the Navy Regulations, issued by you, with the express approval of the President, on the 14th of May last, is in conflict with law,

and whether, in accordance with the provisions of said article, you may detail certain officers of the Marine Corps now in charge of staff departments at headquarters to duty outside of Washington in charge of other offices of the departments to which they belong, and may assign other officers of said departments to duty at headquarters in charge of the staff departments there.

Said article 4141, as quoted by you, provides:

"4141. The officers of the staff departments of the Marine Corps shall be stationed at such places as may be designated by the commandant of the corps. They shall have cognizance of such matters and shall perform such duties as may be required by or in pursuance of law, or that may be assigned by the commandant of the corps."

You do not directly call my attention to the provisions of law with which the article is claimed to conflict, but from the accompanying papers I infer that it is the general statute or statutes organizing the Marine Corps and creating or recognizing the officers which constitute its staff. The present provision of law on the subject is section 22 of the act of March 3, 1899, ch. 413 (30 Stat. 1004, 1009), which reads, in so far as material, as follows:

"SEC. 22. That the staff of the Marine Corps shall consist of one adjutant and inspector, one quartermaster and one paymaster, each with the rank of colonel; one assistant adjutant and inspector, two assistant quartermasters and one assistant paymaster, each with the rank of major; and three assistant quartermasters with the rank of captain.
* * *

This enactment, however, does but repeat the provisions of prior statutes, by virtue of which an adjutant was provided for the Marine Corps as early as July 11, 1798 (1 Stat. 594), and the quartermaster and paymaster at least as early as April 16, 1814 (3 Stat. 124). The act of March 3, 1899, *supra*, simply increases the number of assistants to the three principal staff officers. It is to be noted that in none of these acts are the duties and functions of the three staff officers in question at all specified, but it can not on this account be held that the statute itself imposes none. On the contrary, it is clear that their duties and functions

were presumed by Congress to be so well understood as not to require specific mention, as is the case with many officers, e. g., sheriffs, justices of the peace, etc. In *United States v. San Jacinto Tin Co.* (125 U. S. 273, 280), the Supreme Court said that the judiciary act of September 24, 1789, in providing for an Attorney General of the United States, "must have had reference to the similar office with the same designation existing under the English law." In order, therefore, to give just effect to the legislation of Congress referred to above, it is necessary to determine the duties of the three staff officers in question as generally, and for a long time, understood. Without going into details, it is enough to say broadly that the adjutant is the aid of the commander in maintaining military discipline; that the quartermaster attends to the supplies of the command, and the paymaster to the payment thereof. The particulars are stated with special reference to the Marine Corps in the Navy Regulations of 1909, Chapter XXXII, section 3, pages 349-354—and see the report of the commandant of the corps in 1821 (*Am. St. Papers Naval Affairs*, Vol. I, p. 737).

Congress, therefore, under its constitutional power has created these three staff officers of the Marine Corps—and certain assistants to them—with all the functions and duties briefly described above. A regulation, therefore, which would deprive them of these functions, or place them in a situation where they would be unable to perform them, is necessarily invalid. (*U. S. v. Symonds*, 120 U. S. 46.) An examination of article 4141, *supra*, shows it to be of this character. It is true that the regulation provides—it would appear without any necessity—that the staff officers shall perform such duties as are required by law, but it also requires them to perform such other duties, and be stationed at such places as may be assigned by the commandant. This, then, purports to give the power to the commandant—whether ever exercised or not is immaterial—permanently to impose duties upon these staff officers inconsistent with those of an adjutant, quartermaster, and paymaster of the Marine Corps, and to detach them permanently from the headquarters of the command—the only place where, in

the nature of things, those duties can be regularly performed.

I do not intend to intimate the least doubt that the President, as Commander in Chief of the Army and Navy, may make temporary detail of staff officers away from the headquarters of their command or order them to perform temporarily additional duties in the line of their staff functions or outside of them, but the regulation in question does not purport to do this, but affects to lay down a general rule unlimited as to occasions, by which the seat of duty of these staff officers—whoever they may be—and the duties themselves are to be determined.

In the able briefs submitted by the Judge Advocate General of the Navy, many objections are urged to the above conclusion. Space permits only a brief answer to what appear the most important.

1. Reference is made to the Navy Regulations of 1841, which provided (art. 2) :

"The headquarters and the staff of the Marine Corps shall continue at the city of Washington until otherwise specially directed by the President of the United States or Secretary of the Navy."

From this it is argued that the staff may be removed from headquarters by such direction. The true inference, however, appears to be just the contrary. The article clearly shows that the headquarters and the staff were considered inseparable, so that when the President was given power to remove one, the other must necessarily be moved also.

2. Reference is made to section 1547, Revised Statutes, which provides:

"SEC. 1547. The orders, regulations, and instructions issued by the Secretary of the Navy prior to July 14, 1862, with such alterations as he may since have adopted, with the approval of the President, shall be recognized as the regulations of the Navy, subject to alterations adopted in the same manner."

It is argued that this section gives the force of statutory law to article 4141, *supra*. But clearly section 1547 gives

no power to the President to make regulations in the future in contravention of existing statutes, and that is the character, in my judgment, of article 4141. As said by Attorney General Hoar of a similar provision in the act of July 14, 1862 (13 Op. 9, 12) :

“ * * * No just rule of construction would authorize giving to this provision the force and effect of a general delegation of legislative authority to the Executive, at his pleasure to pass upon and regulate subjects which were, in their own nature, exclusively subjects of legislative action and cognizance, or which Congress had previously fixed by law, and which the regulations thereby recognized had not undertaken to modify or alter.”

3. It is generally argued that the staff of the Marine Corps consists merely of the departments of the adjutant and inspector, quartermaster, and paymaster, respectively; that the adjutant and inspector, quartermaster, and paymaster themselves are, like their assistants, merely officers in those departments and subject, therefore, like those assistants, to be stationed in such places and perform such duties as the proper exigencies of the staff as a whole require. In other words, that the duties of an adjutant, etc., which I have described above, are vested by law not in the adjutant, etc., themselves, but in their departments. This, however, is directly contrary to the enactment of Congress, which has vested these duties not in any department, but in an *adjutant and inspector*, etc., and their assistants. The word “assistant” can not be taken out of the statute and clearly means that the duties of these officers are subordinate. The appropriation acts do not speak of any adjutant and inspector’s department, etc., but of the civil force “in the office of *the adjutant and inspector*”—e. g., act of August 22, 1912 (37 Stat. 351). This act also appropriates for the civil force “in the office of *the assistant quartermaster at San Francisco*.” Can there be any doubt from this that the office of the quartermaster is at headquarters, and that the office at San Francisco is that of an assistant?

In short, it is, in my judgment, clearly inconsistent with the acts of Congress relating to the staff of the Marine

Corps up to and including section 22 of the act of March 3, 1899, to relegate, e. g., the quartermaster to the position of an officer in his own department and to raise one of his assistants to a position not recognized in the statutes, namely, "officer in charge of the quartermaster's department," and this I understand article 4141 to permit and you to intend by virtue of it. I have the honor to be,

Your obedient servant,

J. C. McREYNOLDS.

TO THE SECRETARY OF THE NAVY.

DUTY OF SECRETARY OF WAR WITH RESPECT TO LINCOLN
MEMORIAL.

Under the act of February 9, 1911 (36 Stat. 898), creating the Lincoln Memorial Commission, the Secretary of War must proceed upon the view that it is his duty to enter into such contracts only as, in his opinion, are proper and necessary to carry into fruition the plan and design of the memorial approved by Congress.

If for any reason the course suggested proves to be impracticable, the matter should be brought to the attention of Congress, with a request for a remedy.

DEPARTMENT OF JUSTICE,

December 3, 1913.

SIR: I have the honor to reply to your letter of October 20, wherein you ask to be advised concerning your rights and duties under the act of Congress, approved February 9, 1911 (36 Stat. 898), entitled "An act to provide a commission to secure plans and designs for a monument or memorial to the memory of Abraham Lincoln.

The first section of the act creates William H. Taft and others a commission to procure and determine upon a location, plan, and design for the monument or memorial, subject to the approval of Congress.

The second section authorizes the commission to employ the services of artists, sculptors, architects, and others, as it shall determine to be necessary.

The third section follows:

"That the construction of the monument or memorial, herein and hereby authorized, shall be upon such site as

shall be determined by the commission herein created, and approved by Congress, and said construction shall be entered upon as speedily as practicable after the plan and design therefor is determined upon and approved by Congress, and shall be prosecuted to completion, under the direction of said commission and the supervision of the Secretary of War, under a contract or contracts hereby authorized to be entered into by said Secretary in a total sum not exceeding two million dollars."

The fourth, fifth, and sixth sections provide that vacancies on the commission shall be filled by the President; appropriate \$50,000 to defray the necessary expenses and the cost of procuring plans or designs, and that the commission shall annually submit to Congress an estimate of the amount of money necessary to be expended each year to carry on the authorized work.

Having duly organized, the commission determined upon the location and secured plan and design for the memorial, which were submitted to Congress and approved. Thereupon it advertised for proposals for the construction and received various bids.

You have been requested to enter into contracts for carrying these bids into effect, and in order to remove doubts which have arisen you now ask—

"To what extent, under the statute cited, do my power and duty to make the contract for the construction of this memorial and to supervise its construction impose upon me the responsibility * * * for the regularity and legality of all transactions preliminary to making the contract and obligate me to pass upon all such preliminary matters, including, specifically, the determination of the relative merits of the several bids submitted, which incidentally involve similar determination as to the quality, suitability, and price of the building materials specified in said bids?"

The commission, apparently, maintains that your duties are ministerial, and that, in effect, you should act as its agent and under its direction in respect of making the necessary contracts. Hoping to arrive at a proper solution of the problem, I have examined the opinions submitted by its distinguished members and others.

Answer to your question depends upon the proper construction of section 3. I am unable to conclude that it imposes upon you no other responsibility than that of framing and signing a contract in harmony with the commission's direction.

The language is undoubtedly obscure, but I think you must proceed upon the view that it is your duty to enter into such contracts only as, in your opinion, are proper or necessary to carry into fruition the plan and design of the memorial approved by Congress.

If for any reason the course suggested proves to be impracticable, the matter should be brought to the attention of Congress, with request for a remedy.

Respectfully, yours,

J. C. McREYNOLDS.

TO THE SECRETARY OF WAR.

PURCHASE OF PAPER AND POSTAL CARDS.

All paper furnished by the Public Printer on requisitions for the ordinary use of the executive departments and chargeable to their appropriations must be purchased in accordance with the provisions of the act of January 12, 1895 (28 Stat. 601), regulating the purchase and standard of paper.

The Postmaster General is authorized to contract for, purchase, and inspect paper for the printing of postal cards.

DEPARTMENT OF JUSTICE,

December 30, 1913.

SIR: I have the honor to comply with your request that an opinion be given the Joint Committee on Printing on the following questions:

1. "Whether the executive departments and other establishments of the Government are authorized to buy and furnish paper to the Public Printer for their respective printing, or whether all paper used by the Government Printing Office for the public printing and binding must be purchased by the Public Printer according to standards fixed upon and contracts awarded by the Joint Committee

on Printing, and be inspected by the board of which the committee designates a member, as provided for in the act providing for the public printing and binding and the distribution of public documents, approved January 12, 1895 (28 Stat. 601-624)."

2. "Whether the Postmaster General is authorized to contract for, purchase, and inspect paper for the printing of postal cards by the Public Printer, or whether the fixing of standards and contracting for such paper comes within the jurisdiction of the Joint Committee on Printing as a part of the public printing and binding done by the Public Printer."

As the matter is urgent, I only indicate briefly the conclusions reached.

In my judgment the provisions of the act of January 12, 1895, *supra*, relating to the purchase of paper and the standard quality of the same, are applicable in all respects to such work as the Public Printer is required to perform under section 87, upon requisitions made upon him by a department under section 93, and chargeable to the annual appropriation of such department for printing and binding.

It follows, therefore, that so far as the work referred to in the first question of the joint committee is work furnished on requisitions for the ordinary use of the executive departments and chargeable to their appropriations, such work must in all respects conform to the provisions of the act of January 12, 1895, regulating the purchase and the standard of paper.

The case as to postal cards, however, is different. These articles are not furnished by the Public Printer under the provisions of section 87 of the act of January 12, 1895, but under the provisions of section 3916 of the Revised Statutes, which authorize the Postmaster General to furnish postal cards "manufactured of good stiff paper, of such quality, form, and size *as he shall deem* best adapted for general use"; and the appropriations for postal cards do not come within the provisions of section 93 of the act of January 12, 1895, but within those of the general Post

Office appropriation act. The power of the Public Printer to enter into contracts for furnishing such postal cards is derived by implication from the proviso in the Post Office appropriation act of May 12, 1910 (36 Stat. 365)—

“That no contract for the manufacture of postal cards shall be made by the Government with any department or bureau of the Government at any higher rate than offered for the same work by any responsible contractor, nor shall the bid of such department or bureau be below the cost of such work to the Government.”

The provisions of the act of January 12, 1895, regulating the purchase and standard of paper do not apply to work of this character which the Public Printer is not required to execute, but which he voluntarily undertakes in competition with other bidders. Any other conclusion would make the public bidding which the Postmaster General is required to permit illusory, since private bidders would be compelled to bid upon specifications furnished by the Postmaster General, while the Public Printer would be permitted to bid upon his own specifications. This conclusion is sustained in principle by the decision of the Comptroller of the Treasury in 11 Comptroller's Decisions, 595; by the opinion of the Assistant Attorney General for the Post Office Department in 2 Opinions Attorney General, Post Office Department, 942; and by the decision of the Court of Appeals of this District in *Thomson v. United States* (37 App. D. C. 461, 469, 470).

I think, therefore, that the Postmaster General is authorized to contract for, purchase, and inspect paper for the printing of postal cards.

I have the honor to be, your obedient servant,

J. C. McREYNOLDS.

TO THE PRESIDENT.

DAILY NEWSPAPERS—STATEMENT OF PAID CIRCULATION.

The statement of daily newspapers required to be filed by section 2 of the Post Office appropriation act of August 24, 1912 (37 Stat. 553), should cover the whole *bona fide* paid circulation, however attained, whether sold over the counter, distributed through news agencies and news routes, or disposed of in any other way.

Opinion of September 25, 1912 (29 Op. 526), in so far as it gives a restricted meaning to the words "sold or distributed to paid subscribers," modified.

DEPARTMENT OF JUSTICE,

January 5, 1914.

SIR: In your letter of the 4th ultimo you requested my opinion on the proper construction of paragraph 2, section 2 of the act of August 24, 1912 (37 Stat. 553), which provides that publishers of newspapers, magazines, periodicals, or other publications shall submit semiannually a statement including, among other things, in the case of daily newspapers, "the average of the number of copies of each issue of such publication *sold or distributed to paid subscribers* during the preceding six months," with special reference to these two points:

First, whether copies of daily newspapers actually paid for by a news agent, which constitute the number delivered to him less the number which he returns as unsold; and,

Second, whether copies subscribed for or sold to individuals taking only one copy of a single issue are copies "sold or distributed to paid subscribers" within the contemplation of the said act.

In my opinion this provision of the statute is so broad as clearly to indicate an intention on the part of Congress that the statement shall cover the whole *bona fide* paid circulation of daily newspapers, however attained, whether sold over the counter, distributed through news agencies and news routes, or disposed of in any other way. The addition of the word "distributed" to the word "sold" indicates a desire to reach every form of paid circulation, and the only conceivable purpose of Congress in making this provision is to make known, for the benefit of the public, the average amount of the entire paid circulation of the daily newspapers. No reason is suggested why the provision should be limited in its scope to any particular

kind of circulation. On the contrary, Congress must have intended that the information, if given at all, should be complete.

This conclusion is fortified by the long-established construction which the Post Office Department has placed upon the cognate subject of second-class mail matter. Section 14 of the act of March 3, 1879 (20 Stat. 359), conditions the admission of publications to the second class of mail matter upon their "having a legitimate list of subscribers," and the Post Office Department, as evidenced both by section 438, subdivision 14, of the Regulations of 1902, and by paragraph 5 of the Regulations of January 9, 1911, has always construed this provision to include all copies of the paper which have been genuinely sold or distributed for a compensation either in money or money's worth.

Reference is made to an opinion of Attorney General Wickersham of September 25, 1912 ((29 Op. 526), construing this same provision of the act of August 24, 1912, in a somewhat different manner, but this opinion was rendered prior to the decision of the Supreme Court in the case of *Lewis Publishing Co. v. Morgan* (229 U. S. 288), and was based almost wholly on the ground that the provisions of the act of August 24, 1912, were highly penal in character, since a failure to comply with them entailed entire exclusion from the use of the mails, and it was held that they should, on that account, be strictly construed. The Supreme Court, however, in the above case, held that the act was not punitive, but "was exclusively addressed to the regulation of second-class mail and was shaped in contemplation of the long-established law and regulations governing that class" (229 U. S. 309). I can not concur, therefore, in Mr. Wickersham's opinion, in so far as it gives a restricted meaning to the words "sold or distributed to paid subscribers."

It follows that each of the classes of circulation to which you refer is within the contemplation of the act.

I have the honor to be, your obedient servant,

J. C. McREYNOLDS.

To the POSTMASTER GENERAL.

SURRENDER BY WAR DEPARTMENT OF CERTAIN PERSONAL EFFECTS FORMERLY BELONGING TO JEFFERSON DAVIS.

Where property of a disloyal person was seized by the military forces of the Government during the Civil War, and no proceedings by way of forfeiture, condemnation, sale, etc., were had concerning it as would suffice to divest his title or any portion of it, and transfer it to third persons or to the United States, then a subsequent pardon restores to him his plenary title.

The Secretary of War has authority to surrender certain personal effects in his official possession formerly belonging to Jefferson Davis to the latter's personal representatives.

DEPARTMENT OF JUSTICE,

January 7, 1914.

SIR: In your letter of the 31st ultimo you request an opinion as to your legal right to return certain personal effects in your official possession, and formerly belonging to Jefferson Davis, to the executor of his estate on the written order of all his next of kin.

The articles to which you refer are as follows, to wit: One double-barreled pistol, two dueling pistols, four bullet molds, two pistol holsters, and one pistol case; and they were captured by Union soldiers in June, 1865, sent to the War Department, and have been in the custody of said department ever since. It is stated in the memorandum of the Judge Advocate General of the Army accompanying your letter, and must, therefore, be assumed for present purposes that the property, while technically arms, etc., was really not fitted for purposes of war, but was valued entirely for its personal associations.

While Governments have the inherent right in time of war to seize and take title to the property of enemies, the exercise of that right in this country apparently depends on legislation by Congress (*Brown v. United States*, 8 Cranch, 110). At any rate, in the Civil War it was exercised mainly pursuant to such legislation, and there does not seem any reason to suppose that Mr. Davis's property was seized under any other pretended authority than that either of the confiscation act of July 17, 1862 (12 Stat.

589), as amended by the act of July 2, 1864 (13 Stat. 375), or of the abandoned and captured property act of March 12, 1863 (12 Stat. 820). The former act, by paragraph second of section 5, expressly made it the duty of the President to cause the seizure of all the property of Mr. Davis; but it provided, by section 7, for judicial proceedings of condemnation, and such proceedings have never been had as to the property now in question. The latter act provided that abandoned or captured property—excepting such as had been used or was intended to be used in waging war against the United States—should be turned over to Treasury agents, to be by them sold and the proceeds covered into the Treasury; and it gave any loyal claimant the right to recover the proceeds by preferring his claim in the Court of Claims within two years after the suppression of the rebellion. The articles now in question, however, were never turned over to Treasury agents for sale, but have remained in the custody of the War Department, which originally effected their seizure.

On December 25, 1868, President Johnson issued a proclamation of pardon and amnesty (15 Stat. 711), which, after reciting several other such proclamations within whose terms Mr. Davis did not fall, granted a full pardon and amnesty to every person who directly or indirectly participated in the rebellion, “with restoration of all rights, privileges, and immunities under the Constitution and the laws which have been made in pursuance thereof.”

The effect of such a pardon upon property rights of disloyal persons in land or personalty seized by virtue of the confiscation act or of the abandoned and captured property act has been the subject of discussion by the Supreme Court in numerous cases. In *Klein's case* (13 Wall. 128) it was held that a pardon “blots out the offense pardoned and removes all its final consequences”; so that where property of a disloyal person was seized under the abandoned property act, sold, and its proceeds covered into the Treasury, a subsequent pardon gave the owner the same right as a loyal person to recover the proceeds by

petition in the Court of Claims filed within the requisite two years. The court said (13 Wall. 142) :

"We conclude, therefore, that the title to the proceeds of the property which came to the possession of the Government by capture or abandonment, with the exceptions already noticed, was in no case divested out of the original owner. It was for the Government itself to determine whether these proceeds should be restored to the owner or not. The promise of the restoration of all rights of property decides that question affirmatively as to all persons who availed themselves of the proffered pardon."

In *Carlisle's case* (16 Wall. 147, 151) the court applied these principles to the case of aliens, residents of this country, who aided the rebellion, and said :

"It is true, the pardon and amnesty do not and can not alter the actual fact that aid and comfort were given by the claimants; but they forever close the eyes of the court to the perception of that fact as an element in its judgment, no rights of third parties having intervened."

In *Haycraft's case* (22 Wall. 81, §8) the court refused to give this effect to a pardon where the petition to recover the proceeds of sale of the captured property was not filed within the requisite two years. No contract could be implied against the United States under such circumstances. The court said :

"There is here no question of confiscation. The title of the United States, whatever may be the rights it carries with it, is by authorized capture or appropriation of enemy's property on land. But the same statute which authorized the capture gave a right to certain persons to demand and receive a restoration of their property taken. Coupled with the right to demand was a provision for the remedy by which it was to be enforced. Both the right and the remedy are, therefore, created by the same statute, and in such cases the remedy provided is exclusive of all others. * * *

In *Osborn's case* (91 U. S. 474), where property was forfeited by judicial proceedings under the confiscation act, sold, and the proceeds lodged in the registry of the court, it was held that a pardon restored to the owner the right

to such proceeds, the reasoning of the court being thus expressed (91 U. S. 478) :

"The pardon, in releasing the offense, obliterating it in legal contemplation * * *, removes the ground of the forfeiture upon which the decree rests, and the source of title is then gone."

In *Knote's case* (95 U. S. 149), however, the court refused to apply the above principle to a case where the property had been condemned, sold, and the proceeds covered into the Treasury, distinguishing the case as follows (95 U. S. 154) :

"* * * So, also, if the proceeds have been paid into the Treasury, the right to them has so far become vested in the United States that they can only be secured to the former owner of the property through an act of Congress. Moneys once in the Treasury can only be withdrawn by an appropriation by law. However large, therefore, may be the power of pardon possessed by the President, and however extended may be its application, there is this limit to it, as there is to all his powers—it can not touch moneys in the Treasury of the United States except expressly authorized by act of Congress. The Constitution places this restriction upon the pardoning power.

"Where, however, property condemned, or its proceeds, have not thus vested, but remain under the control of the Executive, or of officers subject to his orders, or are in the custody of the judicial tribunals, the property will be restored or its proceeds delivered to the original owner upon his full pardon. The property and the proceeds are not considered as so absolutely vesting in third parties or in the United States as to be unaffected by the pardon until they have passed out of the jurisdiction of the officer or tribunal. The proceeds have thus passed when paid over to the individual entitled to them in the one case or are covered into the Treasury in the other."

In *Young's case* (97 U. S. 39) the court declined to apply the principle of *Carlisle's case* to an alien giving aid and comfort to the rebellion but not resident here, and hence not owing allegiance to this country, for the reason that he had committed no offense, had lost no rights, and

hence the pardon was as to him ineffectual. The court said (97 U. S. 60) :

"The rightful capture of movable property on land transfers the title to the Government of the captor as soon as the capture is complete, and it is complete when reduced to 'firm possession.' There is no necessity for judicial condemnation. In this respect captures on land differ from those on sea.

"The Government of the United States in passing the abandoned and captured property act availed itself of its just rights as a belligerent, *and at the same time recognized to the fullest extent its duties under the enlightened principles of modern warfare.*"

And again (97 U. S. 66) :

"This court has decided, in reference to the abandoned and captured property act, that a pardon relieves the owner of captured property from the necessity of proving he did not give aid and comfort to the rebellion, because the pardon is equivalent to actual proof of his unbroken loyalty. The language of the late Chief Justice, speaking for the court, in *United States v. Padelford*, *supra*, is, 'The law makes the proof of pardon a complete substitute for proof that he gave no aid or comfort to the rebellion.' This is now the settled rule of decision here, and is not to be disturbed. * * *

In *Pugh's case* (99 U. S. 265) it was held that the owner had the right to recover the proceeds of captured property in the Court of Claims, even where such property had been seized and sold by the military authorities, prior to the passage of the abandoned and captured property act.

In *Briggs' case* (143 U. S. 346) it was *said* by the court that when *cotton* belonging to a disloyal person was captured by the national forces and sold and the proceeds paid into the United States Treasury the title to the property and proceeds passed absolutely to the United States.

In *Jenkins v. Collard* (145 U. S. 546) the court considered the effect of a judicial forfeiture under the confiscation act upon the owners' title to real estate. Having

held in *Bigelow v. Forrest* (9 Wall. 339) that such a forfeiture passed to the United States only an estate for the life of the owner, and in *Wallach v. Van Riebeck* (92 U. S. 202) that the owner, nevertheless, retained no reversionary interest which he could convey, it was held, in *Jenkins v. Collard*, *supra*, that necessarily an interest of some kind remained in him, and when a pardon was granted him his estate revived so as to feed an estoppel created by covenants of warranty, etc., executed when he was under disability. The court said of the status of the owner after the pardon (145 U. S. 559) :

“ * * * he was restored to the control of so much of his property and estate as had not become vested either in the Government or in any other person; especially that part or quality of his estate which had never been forfeited—namely, the naked residuary ownership of the property, subject to the usufruct of the purchaser under the confiscation proceedings.”

These views were repeated in *Dunnington's case* (146 U. S. 338), where it was held that an owner, after forfeiture, sale, and subsequent pardon, still retained an interest which was concluded by condemnation proceedings. The court said (146 U. S. 350) :

“ * * * Assuming that, after the confiscation proceedings, he held only the naked fee without the power of alienation, the amnesty and pardon proclamation of the President, of December 25, 1868, before the proceedings to condemn, removed his disability in this particular, and restored to him the right to make such use of the remainder as he saw fit.”

It may be said that none of these decisions discusses a state of facts precisely similar to the present case; but the principle to be derived from them is sufficient—namely, that where property of a disloyal person was seized by the military forces of the Government during the Civil War, and no such proceedings by way of forfeiture, condemnation, sale, etc., were had concerning it as would suffice to divest his title or any portion of it, and transfer it to third persons or to the United States, then and in that event a subsequent pardon restores to him his plenary title and

right of possession. Such is the present case. As stated at the outset, no condemnation proceedings were had under the confiscation act, nor were the articles taken in charge by the Treasury officials and sold, as required by the abandoned property act. On the contrary, it appears that in 1874 certain of the articles seized—not differing for present purposes from those now in question—were returned to Mr. Davis, and in 1880, others. The failure to return the pistols, etc., seems to have been due merely to oversight.

It follows that, in spite of the seizure, Mr. Davis retained an interest in this property which had not been divested or extinguished in any way at the time of pardon granted, and that the pardon revived his title and right of possession. On his death this title and right passed to his personal representatives; and you have, therefore, ample authority to surrender this property to those persons who fill that character.

I have the honor to be,

Your obedient servant,

J. C. McREYNOLDS.

TO THE SECRETARY OF WAR.

INCOME TAX—SPECIAL ASSESSMENT DISTRICTS.

Special assessment districts, when lawfully created under the authority of the States for the purpose of the improvement of streets and public highways, the provision of sewerage, gas and light, and the reclamation, drainage, or irrigation of considerable bodies of land within the States, are "political subdivisions" thereof within the meaning of the proviso to paragraph B, section 2, of the income-tax provision in the revenue act of October 3, 1913.

DEPARTMENT OF JUSTICE,

January 30, 1914.

SIR: In your letter of the 8th instant you requested an expression of opinion on certain questions arising in the administration of your department in connection with the interpretation of the proviso contained in paragraph B.

section 2, of the revenue act approved October 3, 1913 (the income-tax law), which reads as follows:

"That in computing net income there shall be excluded interest upon the obligations of a State or *any political subdivision* thereof."

In substance, your question is whether special assessment districts created under the laws of the several States for the purpose of the improvement of streets and public highways, the provision of sewerage, gas, light, and the reclamation, drainage, or irrigation of considerable bodies of land within the same are "political subdivisions" of the State within the meaning of the above proviso.

I can not, of course, undertake to pass upon any particular obligation of any specific district of the character referred to. I confine myself to a statement of the principles of law involved, leaving to you the application thereof to specific cases.

The term "political subdivision" is broad and comprehensive and denotes any division of the State made by the proper authorities thereof, acting within their constitutional powers, for the purpose of carrying out a portion of those functions of the State which by long usage and the inherent necessities of government have always been regarded as public. The words "political" and "public" are synonymous in this connection. (Dillon Municipal Corporations, 5th ed., sec. 34.) It is not necessary that such legally constituted "division" should exercise all the functions of the State of this character. It is sufficient if it be authorized to exercise a portion of them. Otherwise the principal advantage sought in making such subdivisions would not be attained. Counties, townships, wards, precincts, all lack something of the fullness of the State itself, and are created to give local government in minor matters to a particular district.

If, then, the special assessment districts to which you refer be lawfully created by a State for the purpose of exercising a portion of its public functions so defined, they are "political subdivisions thereof."

As indicated by the term "special assessment districts," these divisions are given the power of taxation—perhaps

the most important power possessed by the State. A tax can only be laid for a public purpose (*Loan Association v. Topeka*, 20 Wall. 655), and therefore, where the power to levy a tax is given a district by the State, presumptively that district is created for a public use and is exercising a public function. (*Burlington v. Beasley*, 94 U. S. 310; *Blair v. Cuming County*, 111 U. S. 363, 373; *Perry v. Keene*, 56 N. H. 514.) In *Blair v. Cuming County*, *supra*, the court said:

“And when the legislature has given to grist-mills and the water-power connected with them such a public character as in the present case, the improvement of the water-power must be regarded as a public work of internal improvement, which may be aided in its construction by the issue of bonds, under the act in question.”

Nor does it make any difference that the tax is measured by the benefit conferred. A man can not be compelled to pay money, even to benefit himself, and in special assessments based on benefits the question is still preliminary and vital whether the tax has been assessed for a public purpose or not.

Undoubtedly, the legislature might attempt to grant the power of taxation to a district for purposes purely private, but every presumption is against a construction to that effect, and it should not be indulged where the purposes for which the power of taxation is granted have by long usage been treated as public and have been sustained as such by the State courts.

The purposes to which you refer, namely, the improvement of streets and public highways, the provision of sewerage, gas, and lights, the reclamation, drainage, and irrigation of considerable districts of land, are clearly public, and have always been so treated.

In *Davidson v. New Orleans* (96 U. S. 97, 104) a special drainage law of Louisiana was sustained as providing for “a tax, assessment, servitude, or other burden” “imposed upon property *for the public use*, whether it be for the whole State or of some more limited portion of the community.”

In *County of Mobile v. Kimball* (102 U. S. 691) the act creating a harbor board for the improvement of Mobile Harbor and authorizing taxation therefor was sustained as contemplating a public work.

In *Hagar v. Reclamation District* (111 U. S. 701, 704, 705) the reclamation act of California was sustained, the court saying:

“It is not open to doubt that it is in the power of the State to require local improvements to be made which are essential to the health and prosperity of any community within its borders. To this end it may provide for the construction of canals for draining marshy and malarious districts, and of levees to prevent inundations, as well as for the opening of streets in cities and of roads in the country. The system adopted in California to reclaim swamp and overflowed lands by forming districts, where the lands are susceptible of reclamation in one mode, is not essentially different from that of other States, where lands of that description are found. The fact that the lands may be situated in more than one county, can not affect the power of the State to delegate authority for the establishment of a reclamation district to the supervisors of the county containing the greater part of the lands. Such authority may be lodged in any board or tribunal which the legislature may designate.

“In some States the reclamation is made by building levees on the banks of streams which are subject to overflow; in other States by ditches to carry off the surplus water. Levees or embankments are necessary to protect lands on the lower Mississippi against annual inundations. The expense of such works may be charged against parties specially benefited, and be made a lien upon their property. All that is required in such cases is that the charges shall be apportioned in some just and reasonable mode, according to the benefit received.”

In *Wurts v. Hoagland* (114 U. S. 606, 614) the drainage act of New Jersey was sustained as being—

“a just and constitutional exercise of the power of the legislature to establish regulations by which adjoining lands, held by various owners in severalty, and in the

improvement of which all have a common interest, but which, by reason of the peculiar natural condition of the whole tract, can not be improved or enjoyed by any of them without the concurrence of all, may be reclaimed and made useful to all at their joint expense."

In *Essex Public Road Board v. Skinkle* (140 U. S. 334, 339) the court made the following statement concerning a board created by the legislature of New Jersey to construct roads in a certain county:

"The public road board was an involuntary *quasi* corporation, created to construct a public work and authorized to procure the means to accomplish the improvement by the imposition of assessments upon private property. It was purely a governmental agency, existing wholly for public purposes, and whose interests belonged exclusively to the public."

In *Fallbrook Irrigation District v. Bradley* (164 U. S. 112, 161) the California irrigation law was upheld, the court saying:

"It is not essential that the entire community or even any considerable portion thereof should directly enjoy or participate in an improvement in order to constitute a public use."

In *New Orleans Gas Light Company v. Drainage Commission* (197 U. S. 453, 460), the Supreme Court held that a drainage commission was an agency of the State, and as such possessed its police powers; and said:

"The drainage of a city in the interest of the public health and welfare is one of the most important purposes for which the police power can be exercised. The drainage commission, in carrying out this important work, it has been held by the supreme court of the State, is engaged in the execution of the police power of the State."

In *Railway Company v. Drainage Commissioners* (200 U. S. 561, 592), the drainage commission of the State of Illinois was permitted, incidental to its operations, to cause a change of a bridge of a railroad without compensation, the court saying:

"We hold that the police power of a State embraces regulations designed to promote the public convenience or

the general prosperity, as well as regulations designed to promote the public health, the public morals or the public safety."

In *Little v. Williams* (231 U. S. 335), the Supreme Court held that a levee district in Arkansas which had an imperfect title from the State was bound by the subsequent action of the State affecting that title, saying:

"The district was a mere political subdivision of the State, created by the latter, and invested with authority to construct and maintain levees to protect lands within its limits from overflow by the waters of the Mississippi River, and to levy and collect taxes and take other measures to that end. (Laws Ark. 1893, pp. 24, 119.) It was essentially a subordinate agency of the State, was exercising a power of the State for its convenience, could have no will contrary to the will of the State, held its property and revenue for public purposes, and was in all respects subject to the State's paramount authority. In view of this relation, we are quite clear that the State's action was binding upon the district, and that the latter could not, by its subsequent deed to the plaintiff invest her with a title which it no longer possessed."

And this decision was followed in the case of *Chapman & Dewey Lumber Co. v. St. Francis Levee District* (232 U. S. 186), decided by the Supreme Court of the United States on the 26th instant, where the language of the supreme court of Arkansas in *Carson v. St. Francis Levee District*, 59 Ark., at pages 533 to 535, is referred to with approval.

These decisions establish that districts lawfully created by the State for the purpose of constructing works of the character referred to above, and of levying a tax therefor, are portions of the State itself, invested with a part of its sovereign functions, and are therefore political subdivisions thereof.

The decisions of the supreme courts of the several States have been very carefully examined, and it has been found that their conclusions are uniformly in accord. It would stretch this opinion to undue length to refer to them in detail. They may be found in Dillon, *Municipal Corpora-*

tions (5th ed., sec. 34, note 3) and Page and Jones on Taxation by Assessment (sec. 253).

In many of these decisions irrigation districts and the like are referred to expressly or substantially as "political subdivisions;" for example, *Carson v. St. Francis Levee District* (59 Ark. 513, 534); *Land and Stock Company v. Miller* (170 Mo. 240, 253); *Cook v. Port of Portland* (20 Oreg. 580, 588); *Wharton County Drainage District v. Higbee* (149 S. W. Rep. 381, 387); *Rood v. Claypool Drainage & Levee District* (120 Fed. 207, 211); *People v. Hepler* (240 Ill. 196, 199).

The case of *State v. Englewood*, 41 N. J. L. 154, has been cited as determining that a special assessment district is not a political subdivision of the State unless it coincides with a recognized unit of local government, such as a county, township, or city, but this case must be read in connection with *Essex Public Road Board v. Skinkle*, 49 N. J. L. 641, 670, 671, where the court said of the board:

"It may properly be termed a *quasi* corporation, whose functions are wholly of a public nature, and having corporate powers only for certain specified purposes. Such a corporation is a mere agent, employed as part of the machinery of government, to aid in carrying on a portion of its affairs of a local nature."

and with *Smith v. Howell*, 60 N. J. L. 384, where a street lighting district was held to be a political division of the State. So in a case in the court of errors—*Van Cleve v. Passaic Valley Sewerage Commissioners*, 71 N. J. L. 574, 585—the court, while holding the assessment invalid because levied on territory outside the district, said:

"If, for instance, as was suggested by the arguments before us, powers adequate to the execution of the legislative scheme of drainage were conferred upon the entire area to be taxed, and duties respecting the exercise of such powers constitutionally imposed in such manner as indicated that their exercise was compulsory, a question not touched upon in this opinion would be presented."

The law of New Jersey therefore does not seem to differ from that of the other States as to the character of special

assessment districts—at any rate, where the assessments do not exceed the benefit conferred.

In my opinion, therefore, the special assessment districts of the character referred to above, when lawfully created under the authority of the State, are “political subdivisions” thereof; but I desire carefully to refrain from expressing any opinion whether assessment districts might not be created for a purely private purpose so as to bring them within the principles laid down in the South Carolina Dispensary case, 199 U. S. 437, rather than within those which governed *United States v. Railroad Company*, 17 Wall. 322.

I have the honor to be,

Your obedient servant,

J. C. McREYNOLDS.

To the SECRETARY OF THE TREASURY.

TARIFF DUTIES—PREFERENTIAL ON CUBAN SUGAR.

Under the rates of duty imposed by paragraph 177 of the tariff act of October 3, 1913, and effective March 1, 1914 (38 Stat. 131), the 20 per cent preferential on Cuban sugar imported into the United States continues on and after the latter date.

DEPARTMENT OF JUSTICE,

February 20, 1914.

SIR: In your letter of the 16th instant you state that your department has tentatively approved instructions to customs officers to admit Cuban sugars into this country on and after March 1 next at a reduction of 20 per cent of the rates of duty effective on that day. You ask whether these instructions are correct.

Paragraph 177 of the tariff act of October 3, 1913, fixes certain duties on sugars to be effective on and after March 1, 1914, until which date rates of duty prescribed by the corresponding paragraph of the act of August 5, 1909 (36 Stat. 11), shall remain in force; after May 1, 1916, sugars are to be admitted free. (38 Stat. 131.) The rates effective March 1 are a reduction of approximately 25 per cent

of the rates under the Payne-Aldrich Act of 1909 and the Dingley Act of July 24, 1897.

By the commercial reciprocity treaty of 1902 between Cuba and the United States, and by the act of December 17, 1903, in execution thereof, articles of merchandise of Cuban growth or manufacture, including sugars, may be imported from Cuba into the United States at a reduction of 20 per cent of the regular rates. (33 Stat. 2136.) Your specific question is whether this preferential to Cuban sugars continues.

The treaty in question provided that it should not take effect until approved by Congress. This approval took the form of the act of December 17, 1903, under the provisions of which the treaty and the act became effective December 27, 1903. (*United States v. American Sugar Refining Company*, 202 U. S. 563.)

The pertinent articles of the treaty are II, VIII, and XI.

Article II reads:

"During the term of this convention, all articles of merchandise not included in the foregoing Article I and being the product of the soil or industry of the Republic of Cuba imported into the United States shall be admitted at a reduction of twenty per centum of the rates of duty thereon as provided by the Tariff Act of the United States approved July 24, 1897, or as may be provided by any tariff law of the United States subsequently enacted."

Article VIII declares that the rates of duty granted by each country to the other are and shall continue during the term of the treaty preferential in respect to all like imports from other countries, and concludes with the following proviso:

"*Provided*, That while this convention is in force, no sugar imported from the Republic of Cuba, and being the product of the soil or industry of the Republic of Cuba, shall be admitted into the United States at a reduction of duty greater than twenty per centum of the rates of duty thereon as provided by the tariff act of the United States approved July 24, 1897, and no sugar, the product of any other foreign country, shall be admitted by treaty or convention into the United States, while this conven-

tion is in force, at a lower rate of duty than that provided by the tariff act of the United States approved July 24, 1897."

Article XI provides that the convention shall continue five years from the date it takes effect and from year to year thereafter until one year after notice of an intention to terminate it.

The act of December 17, 1903, after directing that it should become effective upon certain action of the President, continues—

"so long as the said convention shall remain in force, all articles of merchandise being the product of the soil or industry of the Republic of Cuba, which are now imported into the United States free of duty, shall continue to be so admitted free of duty, and all other articles of merchandise being the product of the soil or industry of the Republic of Cuba imported into the United States shall be admitted at a reduction of twenty per centum of the rates of duty thereon, as provided by the tariff act of the United States approved July twenty-fourth, eighteen hundred and ninety-seven, or as may be provided by any tariff law of the United States subsequently enacted: The rates of duty herein granted by the United States to the Republic of Cuba are and shall continue during the term of said convention preferential in respect to all like imports from other countries: * * *"

Then follows a proviso identical in terms with that of Article VIII of the treaty above quoted.

1. Both the treaty and the act of Congress look to future changes in rates of duty, and it is their clear intention that the preferential of 20 per cent shall apply not only to the rates of duty then existing under the Dingley Act but to the rates prescribed by any subsequent legislation. The preferential applies to sugar as well as to other articles. Unless, therefore, some specific provision of the treaty or of the new act prevents, the preferential still continues.

2. The foregoing proviso of Article VIII of the treaty and of the law of 1903 is the only law relied upon as preventing the existence of the preferential after March 1.

I.

The first of these questions is as follows:

"Does the fourth section of the act of February 1, 1905 (33 Stat. 628), invest the Secretary of the Interior with jurisdiction to administer the granting of rights of way for transmission lines for the distribution of electrical power within, through, or across national forests; and, if he be invested with such jurisdiction, is he required to call upon the Secretary of Agriculture for an opinion as to whether such proposed rights of way would be compatible with the public interest and whether he will assent to the same?"

Section 4 of the act of February 1, 1905 (33 Stat. 628), provides:

"That rights of way for the construction and maintenance of dams, reservoirs, water plants, ditches, flumes, pipes, tunnels, and canals, within and across the forest reserves of the United States, are hereby granted to citizens and corporations of the United States for municipal or mining purposes, and for the purposes of the milling and reduction of ores, during the period of their beneficial use, under such rules and regulations as may be prescribed by the Secretary of the Interior, and subject to the laws of the State or Territory in which said reserves are respectively situated."

This, being an act bestowing gratuitous privileges in the public property, should not be enlarged by construction (*Wisconsin Central Railroad Co. v. United States*, 164 U. S. 190; *United States v. Utah Power & Light Company*, 209 Fed. 554, 559). The rights granted are described with particularity. The right of way for transmitting and distributing electrical power is not included expressly, nor is it so intimately related to any of the rights enumerated that a grant of the one must needs be implied as essential to the enjoyment of the other. "Dams, reservoirs, water plants, ditches, flumes, pipes, tunnels, and canals" may all be usefully operated "for municipal and mining purposes, and for the purposes of the milling and reduc-

tion of ores" without the transmission and distribution of electrical power. It is true that the instrumentalities which the statute mentions may be made to supply the purposes authorized through the generation of electrical power and its sale and use at distant places, and that an enterprise of that sort might depend upon the enjoyment of one or more rights of way for transmission lines over land reserved for forest purposes. The possibility of such cases, however, though suggesting that the statute might have been usefully extended, affords no excuse for adding by construction to the terms which are expressed another and distinct term which is omitted. *Expressio unius est exclusio alterius*. *United States v. Arredondo*, 6 Pet. 725.

Furthermore, it is quite reasonable to suppose that Congress, though willing to grant the rights which are specified, was not prepared to burden the forests with other rights of way "during the period of their beneficial use" to suit the particular plans of individuals and corporations. Provision had already been made for the granting of revocable permits or licenses to cover a wide variety of uses (act of Feb. 15, 1901, *infra*), and this may well have been regarded as quite enough to insure the full enjoyment of the higher privileges expressly mentioned in the act of 1905.

I am of the opinion, therefore, that the fourth section of the act of 1905 does not invest the Secretary of the Interior with authority to grant rights of way for transmission lines through the national forests for the distribution of electrical power, and this conclusion necessarily disposes of the first question in its entirety.

II.

The second question is:

"In the administration of the act of February 15, 1901 (31 Stat. 790), should applications for revocable permits for telegraph, telephone, and transmission lines within, through, or across national forests, be filed with and administered by the Secretary of the Interior, subject to the right of the Secretary of Agriculture to defeat the grant

by finding that it would be incompatible with the public interest, or should such application be filed in and administered by the Department of Agriculture independently of this department? ”

The act of February 15, 1901 (31 Stat. 790), provides:

“That the Secretary of the Interior be, and hereby is, authorized and empowered, under general regulations to be fixed by him, to permit the use of rights of way through the public lands, forest and other reservations of the United States, and the Yosemite, Sequoia, and General Grant national parks, California, for electrical plants, poles, and lines for the generation and distribution of electrical power, and for telephone and telegraph purposes, and for canals, ditches, pipes and pipe lines, flumes, tunnels, or other water conduits, and for water plants, dams, and reservoirs used to promote irrigation or mining or quarrying, or the manufacturing or cutting of timber or lumber, or the supplying of water for domestic, public, or any other beneficial uses to the extent of the ground occupied by such canals, ditches, flumes, tunnels, reservoirs, or other water conduits or water plants, or electrical or other works permitted hereunder, and not to exceed fifty feet on each side of the marginal limits thereof, or not to exceed fifty feet on each side of the center line of such pipes and pipe lines, electrical, telegraph, and telephone lines and poles, by any citizen, association, or corporation of the United States, where it is intended by such to exercise the use permitted hereunder or any one or more of the purposes herein named: *Provided*, That such permits shall be allowed within or through any of said parks or any forest, military, Indian, or other reservation only upon the approval of the chief officer of the department under whose supervision such park or reservation falls and upon a finding by him that the same is not incompatible with the public interest: *Provided further*, That all permits given hereunder for telegraph and telephone purposes shall be subject to the provision of title sixty-five of the Revised Statutes of the United States, and amendments thereto, regulating rights of way for telegraph companies over the public domain: *And provided further*, That any permis-

sion given by the Secretary of the Interior under the provisions of this act may be revoked by him or his successor in his discretion, and shall not be held to confer any right, or easement, or interest in, to, or over any public land, reservation, or park."

The privileges here authorized are, in their nature, revocable licenses to make certain designated uses of public land within and without the forest and other reservations.

At the date of this act the general superintendency of the forests and the general authority to regulate their use and occupancy were vested in the Secretary of the Interior by the act of June 4, 1897 (30 Stat. 11, 35), and they, as well as the more particular authority declared by the act of 1901, remained so vested until the approval of the act of February 1, 1905, the fourth section of which I have discussed in answering the first question, *supra*. This situation was altered by the first section of that act (33 Stat. 628), which provides:

"That the Secretary of the Department of Agriculture shall, from and after the passage of this act, execute or cause to be executed all laws affecting public lands heretofore or hereafter reserved under the provisions of section twenty-four of the act entitled "An act to repeal the timber-culture laws, and for other purposes," approved March third, eighteen hundred and ninety-one, and acts supplemental to and amendatory thereof, after such lands have been so reserved, excepting such laws as affect the surveying, prospecting, locating, appropriating, entering, relinquishing, reconveying, certifying, or patenting of any of such lands."

Construing the statute very soon after its enactment, the Secretary of the Interior expressed himself as follows in a letter addressed to the Secretary of Agriculture:

"In further reply to your letter of April 28, 1905, and after an informal conference between the law officer of the Forestry Bureau of your department and the Assistant Attorney General for this department, I have to advise you that it is believed the respective jurisdictions of the two departments over applications for rights and privileges within forest reserves may be safely defined as fol-

lows, namely, that your department is invested with jurisdiction to pass upon all applications under any law of the United States providing for the granting of a permission to occupy and use lands in a forest reserve which occupation or use is temporary in character, and which, if granted, will in no wise affect the fee or cloud the title of the United States should the reserve be discontinued, but that this department retains jurisdiction over all applications affecting lands within a forest reserve the granting of which amounts to an easement running with the land, with the further understanding that any permission or license granted by your department is subject to any later disposal of the land by this department. Within the limits of the separate jurisdictions herein defined, it is believed that the actions of the two departments will proceed harmoniously.

"This department would be pleased to be informed as to whether these views coincide with the views of your department, and whether you have any further suggestions to make in the premises."

Letter of June 8, 1905, 33 L. D., 609, 610; see, also, 29 Op. 305.

It may be noted in passing that this language itself is not without its uncertainties. The words "temporary in character" suggest that the privileges grantable by the Secretary of Agriculture must be subject to definite limitations in time or confined to purposes in their nature temporary, while on the other hand the jurisdiction retained by the Department of the Interior is expressly characterized as a jurisdiction to make grants amounting to easements "running with the land." Neither jurisdiction as thus defined would cover the authority to grant permits which, though revocable and conveying no title, may nevertheless be free of express limitations as to time and be intended to subserve purposes of indefinite duration. These difficulties, however, are removed by the practical construction which followed. During the nine years last passed the Secretary of Agriculture has assumed and executed the task of regulating the use and occupation of the forests, pursuant to the act of 1897, *supra*, and therein

has promulgated and from time to time revised elaborate rules and regulations, and issued and reissued innumerable permits for grazing (*United States v. Grimaud*, 220 U. S. 506, 522; *Light v. United States*, *id.* 523), and for other particular uses, which involve the occupation or usufructuary enjoyment of designated areas by the beneficiaries, to the exclusion of other persons. In like manner he has made his regulations under the act of 1901, and has issued in large numbers the revocable licenses therein authorized. Important enterprises have been founded upon the faith of such licenses. Millions of dollars have been expended in the construction of various kinds of plants in reliance upon the authority of the Secretary of Agriculture to permit their erection and operation within the forest reservations.

The construction thus adopted contemporaneously with the enactment of the law and so long and continuously accepted by the departments concerned and relied on by the public is entitled to great weight, and, indeed, unless clearly erroneous must be deemed conclusive. (*United States v. Moore*, 95 U. S. 760, 763; *Schell's Executors v. Fauché*, 138 U. S. 562, 572.) I find no reason for holding it erroneous; certainly none which would justify me in holding it clearly erroneous. The act of 1905, *supra*, directed the Secretary of Agriculture to execute *all* laws affecting the forest lands, save such "as affect the surveying, prospecting, locating, appropriating, entering, relinquishing, reconveying, certifying, or patenting" of such lands. None of the terms employed in this enumeration of excepted functions expresses aptly the function of allowing the revocable permits or licenses contemplated by the act of 1901. Leaving aside the word "surveying," all have peculiar reference to steps in the procuring and conveying of title, or rights leading thereto, such as mining locations. The word "appropriating" is more elastic than the others, and it might be argued that this (if not confined to appropriations for the Government) should be held to include the act of a mere licensee in taking unto himself the privileges of a use or occupation afforded by a revocable permit. Such an extension of the term is plainly not allow-

able. If applied to permits issued under the act of 1901, no reason appears why it should not apply in every other case where a special license is allowed for the use or occupation of forest land. The result would be, by a loose interpretation of this one word, to impair and, in a very large measure to destroy, the jurisdiction of the Secretary of Agriculture, which all must agree it was the purpose of the statute to confer upon him, namely, the jurisdiction to regulate the use and occupation of the national forests. I conclude that the word "appropriating" (if not related solely to appropriations for the Government) must be confined to cases involving the acquisition of some title or vested interest higher in its legal quality than the revocable licenses which are permitted under the act of 1901. This interprets the term in harmony with the others with which it is associated in the exception and construes the statute as a whole in accordance with the uniform and continuous practice in its administration.

The second question is therefore answered as follows:

Applications for revocable permits under the act of February 15, 1901 (31 Stat. 790), should be filed with and passed upon by the Secretary of Agriculture when they relate to lands of the national forests.

III.

The third question is:

"Does the Department of Justice, upon further consideration, adhere to its opinion of February 3, 1912 (29 Op. 303), construing the act of March 4, 1911 (36 Stat. 1253)?"

I have carefully considered the opinion mentioned in the light of all the suggestions made concerning it, but am unable to find any sufficient reason for changing the conclusions there expressed.

A fourth question relates to the public-land laws applicable to Alaska. This will be dealt with in a separate opinion.

Respectfully,

J. C. McREYNOLDS.

TO THE SECRETARY OF THE INTERIOR.

CANAL ZONE—IMPORTATION AND USE OF OPIUM—JURISDICTION OF COURTS.

Sections 5 and 6 of the act of January 17, 1914, which is amendatory of the act of February 9, 1909 (35 Stat. 614), prohibiting the importation and use of opium for other than medical purposes, are applicable to the Canal Zone.

The courts of the Canal Zone have jurisdiction, under the Panama Canal act of August 24, 1912 (37 Stat. 560), to impose the penalties prescribed in section 7 of the said act of January 17, 1914.

DEPARTMENT OF JUSTICE,

July 14, 1914.

SIR: I have the honor to acknowledge the receipt of your communication of July 3, in which you request my opinion as to whether—

“Sections 5 and 6 of the act of Congress, approved January 17, 1914, entitled ‘An act to amend an act entitled, “An act to prohibit the importation and use of opium for other than medicinal purposes,” approved February ninth, nineteen hundred and nine,’ are applicable to the Canal Zone, and if so would the courts of the Canal Zone have jurisdiction to impose the penalties prescribed in section 7 of the act?”

The pertinent portions of sections 5 and 6 of the act in question read as follows:

“Sec. 5. That no smoking opium or opium prepared for smoking shall be admitted into the United States, or into any territory under the control or jurisdiction thereof, for transportation to another country, nor shall such opium be transferred or transshipped from one vessel to another vessel within any waters of the United States for immediate exportation or any other purpose.

“Sec. 6. That hereafter it shall be unlawful for any person subject to the jurisdiction of the United States to export or cause to be exported from the United States, or from territory under its control or jurisdiction, or from countries in which the United States exercises extraterritorial jurisdiction, any opium or cocaine, or any salt, derivative, or preparation of opium or cocaine, to any other country. * * *

I am clearly of the opinion that these sections are applicable to the Canal Zone. That the Canal Zone is "territory under the control or jurisdiction" of the United States has been held in a long line of opinions by the Attorneys General (see 25 Op. 441, 444, 474; 26 Op. 113, 116; 26 Op. 376, 377; 27 Op. 136, 138). The opinions, seemingly *contra*, rendered with relation to the tariff act of 1909 and the eight-hour law of 1913, in 27 Op. 594, and in 30 Op. 142, were concerned with constructions of special statutes, and were not determinative of the general question.

That Congress in recent statutes clearly regards the Canal Zone as a possession of the United States, and therefore subject to its jurisdiction, is seen in the explicit provisions of the employer's liability act of April 22, 1908, c. 149, sec. 2 (35 Stat. 65), that "every common carrier by railroad in the Territories, the District of Columbia, the Panama Canal Zone, or other possession of the United States," etc., and of the immigration act of February 20, 1907, c. 1134, sec. 33 (34 Stat. 908), that the term United States "shall be construed to mean the United States and any waters, territory, or other place subject to the jurisdiction thereof, except the Isthmian Canal Zone."

In answer to the second part of your question, I reply that, in my opinion, the courts of the Canal Zone have jurisdiction under the Panama Canal act of August 24, 1912, c. 390 (37 Stat. 560, *et seq.*).

You state further in your letter: "Your opinion is also desired as to whether any other sections of the act referred to are applicable to the Canal Zone."

If any special matter shall arise in the administration of your department involving other sections of the act and my opinion shall be desired on any definite point of law relating thereto, I shall be glad to give it consideration on your further request.

Respectfully,

J. C. McREYNOLDS.

To the SECRETARY OF WAR.

INCOME TAX—DOMESTIC CORPORATE STOCK OWNED BY
NONRESIDENT ALIENS.

Shares of stock of domestic corporations owned by nonresident aliens are not "property * * * in the United States," within the meaning of the act of October 3, 1913 (38 Stat. 166), and dividends accruing therefrom to such nonresident aliens are not subject to any tax under said act.

DEPARTMENT OF JUSTICE.

July 15, 1914.

SIR: I have the honor to acknowledge the receipt of your letter of February 26, 1914, in which you request my opinion—

"Whether, under the provisions of the act imposing an income tax, dividends of corporations accruing to nonresident aliens are subject to the normal or the additional tax, or both, and whether, for the purposes of the normal tax, they should be withheld at the source by the corporation or by the agent of said alien nonresident stockholders receiving them for transmission out of the country to said owners."

Subdivision 1 of paragraph A of section II of the revenue act of October 3, 1913 (38 Stat. 166), by which the normal tax is imposed, provides as follows:

"That there shall be levied, assessed, collected and paid annually upon the entire net income arising or accruing from all sources in the preceding calendar year to every citizen of the United States, whether residing at home or abroad, and to every person residing in the United States, though not a citizen thereof, a tax of 1 per centum per annum upon such income, except as hereinafter provided: and a like tax shall be assessed, levied, collected, and paid annually upon the entire net income from all property owned and of every business, trade, or profession carried on in the United States by persons residing elsewhere."

In my opinion, the mere receipt of dividends and income from domestic corporate stock by a nonresident alien, is not a "business, trade, or profession carried on in the United States." See *McCoach v. Minehill Railroad Co.* (1913), 228 U. S. 295.

Your question is, therefore, in substance: Are shares of domestic corporate stock owned by nonresident aliens "property * * * in the United States," within the meaning of the above statute.

The fact that property and its situs, in relation to the taxing power, have been frequent subjects of judicial interpretation by Federal and State courts, must be given weight in construing the intention of Congress in using the words above quoted.

In *Covington v. First National Bank of Covington* (1905), 198 U. S. 100, 111, it had been held:

"The situs of shares of foreign-held stock in an incorporated company, in the absence of legislation imposing a duty upon the company to return the stock within the State as the agent of the owner, is at the domicile of the owner. Cooley on Taxation, 16."

A similar statement of the law is found in *Hawley v. Malden* (1914), 232 U. S. 1, 11, 12 (decided in January, 1914, within three months after the passage of the Income Tax Law):

"While the shareholder's rights are those of a member of the corporation entitled to have the corporate enterprise conducted in accordance with its charter, they are still in the nature of contract rights or *choses in action*. Morawetz on Corporations, sec. 225. As such, in the absence of legislation prescribing a different rule, they are appropriately related to the person of the owner, and, being held by him at his domicile, constitute property with respect to which he is under obligation to contribute to the support of the Government whose protection he enjoys."

The courts having thus defined the situs of corporate stock for purposes of taxation, and a tax upon income being a direct property tax, *Pollock v. Farmers Loan & Trust Co.*, 158 U. S. 601 (the sixteenth amendment merely enlarging the powers of the United States, without changing the legal nature of the tax), it follows that Congress must be deemed to have used the words "property * * * in the United States" as including only such forms of property as had a legal situs therein. I find in this statute no enactment taxing income from corporate

stock in specific terms, and no appropriate language evincing any intention to fix by legislation the situs of such stock.

The intention of Congress to impose a tax must be expressed in "clear and unambiguous" language. *United States v. Isham* (1873), 17 Wall. 496, 504; *Eidman v. Martinez* (1902), 184 U. S. 578, 583; *Benziger v. United States* (1904), 192 U. S. 38, 55; *Spreckels Sugar Refining Co. v. McClain* (1904), 192 U. S. 397, 416; 23 Op. 62.

In my opinion, therefore, shares of stock of domestic corporations owned by nonresident aliens are not "property * * * in the United States" within the meaning of the act of October 3, 1913, and dividends accruing therefrom to such nonresident aliens are not subject to any tax under said act.

This opinion is confined to a construction of the legal import and intent of the statute in question; and I express no opinion whatever as to the power of Congress, by appropriate legislation, to impose such a tax.

Respectfully,

J. C. McREYNOLDS.

To the SECRETARY OF THE TREASURY.

TARIFF DUTIES—IMPORTATION OF COFFEE INTO PORTO RICO.

So much of the provisions of sections 2 and 3 of the act of April 12, 1900 (31 Stat. 77), as refers to the importation of coffee into Porto Rico was repealed by the tariff act of August 5, 1909 (36 Stat. 71), and is no longer in force, but the provisions of the tariff act of October 3, 1913 (38 Stat. 152), including coffee upon the free list, are applicable to its importation into Porto Rico.

DEPARTMENT OF JUSTICE,

July 30, 1914.

SIR: I have the honor to acknowledge the receipt of your communication of June 8, 1914, in which you ask for an expression of my opinion on the question whether the provisions of the act of April 12, 1900, sections 2 and 3 (31 Stat. 77), are still in force with reference to the importation of coffee into Porto Rico.

The pertinent portions of the sections stated by you are as follows:

"SEC. 2. That on and after the passage of this act the same tariffs, customs, and duties shall be levied, collected, and paid upon all articles imported into Porto Rico from ports other than those of the United States which are required by law to be collected upon articles imported into the United States from foreign countries: *Provided*, That on all coffee in the bean or ground imported into Porto Rico there shall be levied and collected a duty of five cents per pound, any law or part of law to the contrary notwithstanding * * *

"SEC. 3. * * * That on and after the date when this act shall take effect, all merchandise and articles, except coffee, not dutiable under the tariff laws of the United States, and all merchandise and articles entered in Porto Rico free of duty under orders heretofore made by the Secretary of War, shall be admitted into the several ports thereof, when imported from the United States, free of duty, all laws or parts of laws to the contrary notwithstanding; and whenever the legislative assembly of Porto Rico shall have enacted and put into operation a system of local taxation to meet the necessities of the government of Porto Rico, by this act established, and shall by resolution duly passed so notify the President, he shall make proclamation thereof, and thereupon all tariff duties on merchandise and articles going into Porto Rico from the United States or coming into the United States from Porto Rico shall cease, and from and after such date all such merchandise and articles shall be entered at the several ports of entry free of duty; and in no event shall any duties be collected after the first day of March, nineteen hundred and two, on merchandise and articles going into Porto Rico from the United States or coming into the United States from Porto Rico."

With reference to the importation of coffee into Porto Rico from the United States, I am of the opinion that under the proclamation of the President, dated July 25, 1901, and under the express provisions of section 3—

"That in no event shall any duties be collected after the first day of March, nineteen hundred and two, on merchandise and articles going into Porto Rico from the United States,"

no duty can now be collected upon coffee. (See also *Jordan v. Roche* (1913), 228 U. S. 436, 440, 441.)

With reference to the importation of coffee into Porto Rico from countries other than the United States, while it appears that section 2 of the above act has never been repealed in express terms, yet the general tariff acts of 1909 and 1913 contain sections repealing "all acts and parts of acts inconsistent" with the provisions of each, respectively.

At the date of the passage of the special Porto Rico act of 1902, the importation of coffee into the United States was governed by the tariff act of 1897 (30 Stat. 194), chapter 11, section 2, item 529, under which coffee was exempt from duty. The Porto Rico act imposing a duty of 5 cents per pound was therefore a special act excepting imports of coffee into Porto Rico from the general law.

The question arises whether there is such an "irreconcilable conflict" between the special act and the later general tariff acts that the two can not exist together under the doctrines laid down in *Ex Parte Crow Dog*, 109 U. S. 556, 570, 571 (1883); *Rodgers v. United States*, 185 U. S. 83, 88, 89, 92 (1902); *United States v. Nix*, 189 U. S. 199, 205 (1903); *Petri v. F. E. Creelman Lumber Co.*, 199 U. S. 487, 497, 498 (1905); *Ex Parte United States*, 226 U. S. 420, 424 (1913); and 21 Op. 338, 339 (1896).

The tariff act of 1909 (36 Stat. 71), chapter 6, section 1, provided as follows:

"FREE LIST.

"That on and after the day following the passage of this act, except as otherwise specially provided for in this act, the articles mentioned in the following paragraphs shall, when imported into the United States or into any of its possessions (except the Philippine Islands and the islands of Guam and Tutuila), be exempt from duty."

And item 541 under the free list enumerated "coffee."

The tariff act of 1913 (38 Stat. 152, c. 16, sec. 1), contained exactly the same provision as the act of 1909 with reference to the free list, and included therein "item 457—coffee."

The specific exception in these statutes of importations into those "possessions" of the United States known as the Philippine Islands and the islands of Guam and Tutuila is evidence that the attention of Congress was expressly drawn to the subject of importations into all of the "possessions" of the United States, and that by making exceptions in three specific cases it evinced its intention to make none in the case of "any of its possessions" other than those so enumerated. The legislative history of the act further shows that express attention to the subject of "possessions" was given by Congress; for in the draft of the bill as it passed the House of Representatives the only "possession" excepted was the "Philippine Islands," whereas in the bill as it passed the Senate "the islands of Guam and Tutuila" were added to the excepted "possessions." (H. Doc. 92, 61st Cong., 1st sess.)

Porto Rico is clearly a "possession" of the United States. (*American Railroad Co. of Porto Rico v. Birch* (1912), 224 U. S. 547, 555; *American Railroad Co. of Porto Rico v. Didricksen*, 227 U. S. 145, 148 (1913). See *Kopel v. Bingham* (1909), 211 U. S. 468, and *Martinez v. Asociacion de Senoras* (1909), 213 U. S. 20, 24.)

From its character as a "possession," therefore, it follows that importations into Porto Rico, not being specially excepted by the tariff acts of 1909 and 1913, were to be governed by the general provisions of the free list. *Expressio unius est exclusio alterius*. (*United States v. Arredondo*, 6 Pet. 691, 725 (1832); *Kendall v. United States*, 107 U. S. 123, 125 (1882).)

Answering your question, therefore, I am of the opinion that so much of the provisions of sections 2 and 3 of the act of April 12, 1900, as refers to the importation of coffee into Porto Rico was repealed by the tariff act of 1909, chapter 6 (36 Stat. 71), and is no longer in force,

and that the provisions of the tariff act of 1913, chapter 16, including coffee upon the free list, are applicable to its importation into Porto Rico.

Respectfully,

J. C. McREYNOLDS.

TO THE SECRETARY OF THE TREASURY.

APPOINTMENTS—ACTING ASSISTANT DENTAL SURGEON
IN NAVY.

The act of March 4, 1913 (37 Stat. 903), creating a Navy Dental Reserve Corps, did not repeal the provision of the act of August 22, 1912 (37 Stat. 344), authorizing appointments to the grade of acting assistant dental surgeon in the Navy from among dental graduates in civil life.

DEPARTMENT OF JUSTICE,

August 22, 1914.

SIR: I have received your letter of August 6, 1914, in which you request my opinion as to whether "the Secretary of the Navy is authorized to make appointments to the grade of acting assistant dental surgeon in the Navy, in accordance with the act of August 22, 1912 (37 Stat. 344), notwithstanding the act of March 4, 1913 (37 Stat. 903), which created a Dental Reserve Corps in the Navy. In other words, whether the act of March 4, 1913, has impliedly repealed the act of August 22, 1912, in so far as the latter act authorized appointments to the grade of acting assistant dental surgeon from among dental graduates in civil life who possess the necessary qualifications."

The answer to your question requires a detailed consideration of a series of statutes by the enactment of which it would appear that Congress by successive steps has attempted to construct a consistent system of reserve corps from the Medical Corps of the Army and Navy and from the Dental Corps of the Navy.

The act of April 23, 1908, chapter 150 (35 Stat. 66), established a Medical Department of the United States Army to consist of a Medical Corps, a Medical Reserve Corps, and the Hospital Corps, the Nurse Corps, and dental surgeons.

To constitute the Medical Reserve Corps, it was provided that the President might issue commission as first lieutenant "to such graduates of reputable schools of medicine, citizens of the United States," as should be found on examination qualified. "Officers of the Medical Reserve Corps who apply for appointment in the Medical Corps of the Army may * * * be placed on active duty by the Secretary of War, and ordered to the Army Medical School for instructions and further examination."

The naval appropriation act of August 22, 1912, chapter 335 (37 Stat. 344), provided that a Medical Reserve Corps be established as a part of the Medical Department of the Navy "under the same provisions in all respects (except as may be necessary to adapt the said provisions to the Navy) as those providing a Medical Reserve Corps for the Army." Under this act (by reference to the Army Medical Reserve Corps act of 1908), civilian graduates of reputable schools of medicine might be commissioned in the Navy Medical Reserve Corps; and such officers of the Navy Medical Reserve Corps might be placed on active duty and ordered to the Navy Medical School for instruction, as provided in said act of 1908.

This same act of August 22, 1912, contained further clauses referring to a Dental Corps for the Army, and as a part of such corps provision is made for the appointment of 30 assistant dental surgeons "to be a part of the Medical Department of the United States Navy, the appointees to be probationary at the outset and appointed by the Secretary of the Navy, under the designation of acting assistant dental surgeon" and to be "citizens of the United States between twenty-four and thirty-two years of age," and "graduates of standard medical or dental colleges," and to be examined professionally at the end of three years, such acting assistant dental surgeons who have had at least two years' service found qualified after competitive examination "shall be appointed assistant dental surgeon with the rank of lieutenant (junior grade)."

The naval appropriation act of March 4, 1913, chapter 148 (37 Stat. 903), authorized a Navy Dental Reserve

Corps "to be organized and operated," under the provisions of the Navy Medical Reserve Corps act of 1912, "and differing therefrom in no respect other than that the qualification requirements of the appointees shall be dental surgeons," etc. There was an additional proviso as follows: "*Provided further*, That Dental Corps officers of permanent tenure *shall* be appointed from the Dental Reserve Corps membership in accordance with the said provisions of the said act, and all such appointees shall be citizens of the United States between twenty-two and thirty years of age, of good moral character, of unquestionable professional repute, and before appointment shall pass satisfactory physical and professional examinations."

The question presented by you is whether by providing that Dental Corps officers of permanent tenure *shall* be appointed from the Dental Reserve Corps membership, Congress intended to confine your appointments to the Dental Reserve Corps and to exclude you from appointing assistant dental surgeons from among the Dental Corps probationers, under the provisions of the act of 1912.

I am of the opinion that such was not the intention.

This Navy Dental Reserve Corps is explicitly to be "organized and operated under the provisions of" the act creating the *Navy Medical Reserve Corps*, which corps in turn (by the wording of the act of 1912) was to be "established" * * * "under the same provisions in all respects" as the *Army Medical Reserve Corps*. One of the provisions of the act of 1908, creating the latter was that officers "*who apply* for appointment in the Medical Corps *may* be placed on active duty * * * and ordered to the Army Medical School for instruction and further examination." This provision was, by virtue of the act of 1912, made applicable to the Navy Medical Reserve Corps. It was part of the operation of that corps, for it established the means and the method by which members of that reserve corps could be promoted and placed on active duty, and it therefore affected the management of the corps and the personnel of its officers. The word "operate," in the Standard Dictionary (1911), is defined: I. 2. "To conduct or manage the affairs of." This pro-

vision as to promotion can fairly be deemed to be within the meaning of the word "operate."

Moreover, the act of 1913 states that the Navy Dental Reserve Corps "is hereby authorized * * * *differing* * * * *in no respect*" from the Navy Medical Reserve Corps. If this discretionary feature as to promotion from the reserve corps were to be omitted, the Dental Reserve Corps would differ in a vital respect.

It has been argued that the proviso that "Dental Reserve Corps officers of permanent tenure *shall* be appointed from the Dental Reserve Corps," forbids appointments of such officers to be made from any other source.

I am of the opinion that these words must be construed in connection with the prior words "to be organized and operated," under the provisions of the Navy Reserve Corps act of 1912, and that they also must be construed in connection with the words "and differing therefrom in no respect," found in the act of 1913 itself; and that they are not to be taken as cutting down the force or the breadth of such prior expressions.

It must further be noticed that the phraseology of this proviso is, "shall be appointed from the Dental Reserve Corps *in accordance with the said provisions of the said act.*"

The "said act" means the Navy Medical Reserve Corps act of 1912. But it is impossible to appoint them "in accordance with the provisions of the said act" if "*shall*" here is to be construed as "*shall only.*" For the provision of the act of 1912 was that reserve corps officers "who apply for appointment in the Medical Corps *may* be placed on active duty," i. e., the appointment was discretionary.

In order to effect any consistency in the phraseology of the act of 1913 and to reconcile it with the apparent intent of Congress to construct a consistent system of reserve corps in the Medical and Dental Departments of the Army and Navy, it is necessary to construe the words "shall be appointed" as meaning that *whenever* Dental Reserve Corps officers shall be promoted or appointed to the Dental Corps, as authorized, they *shall* be so appointed "in accordance with the said provisions of the said act,"

i. e., the act of 1912 constituting the Navy Medical Reserve Corps; and that they shall have the further qualifications prescribed by the proviso in the act of 1913; in other words, that whenever the Secretary of the Navy exercises the discretion given him to appoint officers from the Dental Reserve Corps to active duty, such officers *shall* be appointed as the proviso in the act of 1913 sets forth.

It has been argued that, so construed, this proviso is a superfluous clause.

The evident reason for its insertion is that it fixes certain prescribed qualifications to be possessed by officers when appointed to active duty from the Dental Reserve Corps into the Dental Corps, these being new restrictions not found in either the act of 1908 or in the act of 1912 upon the discretionary appointment of officers from the Army and Navy Medical Reserve Corps to the Army and Navy Medical Corps, respectively. This is made clear by reference to the clause of the act of 1908 giving the Secretary discretion to place on active duty in the Medical Corps officers of the Medical Reserve Corps, which reads as follows:

“Officers of the Medical Reserve Corps who apply for appointment in the Medical Corps * * * may upon the recommendation of the Surgeon General be placed on active duty by the Secretary * * * and ordered to the * * * Medical School for instruction and further examination to determine their fitness for commission in the Medical Corps.”

It will be seen that nothing is said here as to the *age or other qualifications* which such officers who apply for promotion in the Medical Corps shall possess; though there were qualifications fixed in section 7 of the act for *original entrance* into the reserve corps, and similar qualifications are found in the first part of the act of 1913 for *original entrance* into the Dental Reserve Corps.

I concur with the conclusions (though not with all the reasoning) of the memorandum of opinion submitted by you to me from the Judge Advocate General of the Navy, and I am of the opinion that the act of March 4, 1913, did not repeal the act of August 22, 1912, authorizing appoint-

ment to the grade of acting assistant dental surgeon from among dental graduates in civil life.

Respectfully,

J. C. McREYNOLDS.

To the SECRETARY OF THE NAVY.

TENNESSEE LAND TITLES.

The title of the Cherokee Indians to the lands ceded by them to the United States by the treaty of New Echota (7 Stat. 478), was a right of occupancy only, the underlying fee being in the State of Tennessee.

The treaty freed the lands of the burden of the Indian title, leaving the unencumbered fee in the State.

DEPARTMENT OF JUSTICE,

September 2, 1914.

SIR: I have the honor to reply to your letter of July 27, 1914, inclosing a memorandum relating to a tract of land in Polk County, Tenn., the acquisition of which is desired under the provisions of the Weeks Forestry Law (36 Stat. 961), and requesting my opinion on a question of law which affects the title thereto.

The lands lie within the area ceded to the United States by the Cherokee Indians by the treaty of New Echota proclaimed May 23, 1836. (7 Stat. 478.)

The title offered to the Government is founded on grants made in 1842 by the State of Tennessee to Francis W. Lea, and you state that there is grave doubt whether Tennessee had power to make these grants and that the title to these lands seems to be still vested in the United States.

This conclusion is based on the language employed in the treaty of New Echota, and it is therefore essential to a proper understanding of the question that the historical events antedating the grants made to Lea be stated.

All of the soil of Tennessee, including Polk County and the lands in question, was once a part of the territory of North Carolina.

By an act dated April 18, 1783, North Carolina opened for entry and settlement her western territory. Section 5 of the act reads as follows:

“The Cherokee Indians shall have and enjoy all that tract of land bounded as follows” [here follows a descrip-

tion including the lands in question] "and the lands contained within the aforesaid bounds, shall be, and are hereby reserved unto the said Cherokee Indians and their nation forever." (Martin's N. C. Laws, 1804, v. 1, p. 322.)

In 1789 North Carolina ceded to the General Government the soil and sovereignty of the territory now within the limits of Tennessee, and the cession was accepted by the United States. (1 Stat. 106, ch. 6.)

The cession act made provision for the claims of individuals to whom North Carolina had given rights to make entries of lands, but no reservation or exception was made which related to the lands occupied by the Cherokee Indians. There can be no doubt, therefore, that by the cession the United States obtained title in fee to all the vacant lands in Tennessee, qualified by the right which North Carolina retained of perfecting inchoate titles created under her laws. (*Burton v. Williams*, 3 Wheat. 529.)

On June 1, 1796, Tennessee was admitted to the Union. (1 Stat. 491, ch. 47.) In the act as passed no provision was inserted respecting unappropriated lands, and in view of this circumstance the State made claim to all such lands within her limits.

The legislature by an act passed November 1, 1801 (acts of Tenn. 1801, ch. 39), instructed her Representatives in Congress to assert for the State the absolute right of disposing of these vacant and unappropriated lands, and to procure from the United States a relinquishment of their claims thereto.

Tennessee was embarrassed, however, in the assertion of her claims by the rights reserved by North Carolina to perfect titles initiated under her laws.

After considerable negotiation the latter State passed an act ceding to Tennessee the right to perfect, by grant, these inchoate titles, and the terms of the cession were agreed to and ratified by Tennessee. (Acts of North Carolina 1803; acts of Tennessee 1804, ch. 14.)

Under the Constitution and by the terms of the act the consent of Congress was required to perfect the compact. and this afforded the United States the means of resum-

ing, in part, the soil they were supposed, inadvertently, to have ceded by the act of 1796 and was the groundwork of the compact of 1806. (*Burton v. Williams*, 3 Wheat. 529.)

On April 18, 1806 (2 Stat. 381, ch. 31), an act was passed by the Congress the purpose of which was, as disclosed by its title (1) to authorize the State of Tennessee to issue grants and perfect titles, and (2) to settle the claims to the vacant and unappropriated lands within the State.

An irregular line was drawn across the State dividing it approximately into halves and the claim of the United States to all the lands south and west of this line was acknowledged, and the claim of the State was relinquished.

Thereupon the United States "ceded and conveyed" to Tennessee—

"all right, title, and claim, which the United States have to the territory of the lands lying east and north of the line hereinbefore established, within the limits of the State of Tennessee, subject to the same conditions as are contained in the act of the general assembly of the State of North Carolina, intituled 'An act for the purpose of ceding to the United States of America, certain western lands therein described.' And the said State of Tennessee shall thereupon have as full power and authority to issue grants and perfect titles of all lands lying east and north of the before described line, within the limits of the said State, as Congress now have, or the State of Tennessee might have, by virtue of an act of the State of North Carolina, intituled 'An act to authorize the State of Tennessee to perfect titles to lands reserved to this State by the cession act,' to which said act the assent of Congress is hereby given, so far as is necessary to carry into effect the objects of this compact."

Certain restrictions and provisos follow, none of which are material except the following:

"(1) *Provided*, That nothing contained in this act shall be construed to affect the Indian title, or to subject the United States to the expense of extinguishing the same.

"(2) *And provided further*, That nothing herein contained shall be construed to enable any person or persons,

until authorized by the Legislature of the State of Tennessee, to locate any warrant issued under the authority of the State of North Carolina, within the limits of the lands reserved to the Cherokee Indians, by the fifth section of the act of said State, intituled 'An act for opening the land-office for the redemption of specie and other certificates, and discharging the arrears due to the Army,' passed in the year one thousand seven hundred and eighty-three.

"(3) That if the territory hereinbefore ceded to the State of Tennessee, shall not contain a sufficient quantity of land fit for cultivation, according to the true intent and meaning of the original act of cession, *including the lands within the limits reserved by the State of North Carolina, to the Cherokee Indians*, to perfect all existing legal claims charged thereon by the condition contained in this act of cession, Congress will hereafter provide by law for perfecting such as cannot be located in the territory aforesaid, out of the lands lying west or south of the before described line."

This language leaves no room for the assumption that the title to the lands within the Cherokee area did not pass by the cession. Indeed the paragraphs just quoted seem clearly to recognize the right of Tennessee ultimately to authorize the location of warrants and to perfect titles to lands within the Indian country.

It is true that the United States refused to assume the expense of extinguishing the Indian title, which responsibility she had, in 1802, assumed in the case of the State of Georgia. Later, however, the burden was voluntarily assumed, and the Indian title was extinguished at the expense of the General Government.

The United States, having control under the Constitution of the Indian tribes, from time to time concluded treaties with the Indians by which their boundaries were gradually narrowed, and finally by the treaty of New Echota the Cherokees relinquished all of their remaining lands east of the Mississippi and removed to the lands provided for them west of the Mississippi. (7 Stat. 478 et seq.)

The pertinent language of the treaty is as follows:

"The Cherokee Nation hereby cede, relinquish, and convey to the United States all the lands owned, claimed, or possessed by them east of the Mississippi River."

Does the language just quoted have the effect to vest in the United States the fee to these lands?

The solution of the question depends upon the nature of the Indian title to these lands.

The Indian title, in the absence of treaty stipulation or congressional grant, is not in any sense a fee simple title and bears no resemblance to the tenures known to the common law.

The right of the Indians to the soil is based on their aboriginal occupancy, and their title is a right to possession which can not be alienated without the consent of the sovereign authority. The underlying fee remains in the State where the land is situated, or in the United States as successor to the rights of the European discoverers.

It has always been the policy of the Government to respect Indian rights until extinguished by treaty, but it has never been assumed that the Indian title prevented the United States or the States from granting the underlying fee to lands occupied by Indians, subject to the burden of their occupancy, and such grants may be made without their consent.

It follows that the United States or the State holding the fee, before any cession is made by the Indians, may convey an estate in fee simple in Indian lands subject to their rights of occupancy. (*Fletcher v. Peck*, 6 Cranch, 87, 141; *Johnson v. McIntosh*, 8 Wheaton, 543, 583; *Cherokee Nation v. Georgia*, 5 Pet. 38; *Worcester v. Georgia*, 6 Pet. 515; *Mitchell v. U. S.*, 9 Pet. 711, 746; *Clark v. Smith*, 13 Pet. 195, 200; *Lattimer v. Poteet*, 14 Pet. 4, 14; *Holden v. Joy*, 17 Wall. 211; *Buttz v. Northern Pac. R. R.*, 119 U. S. 55, 56; *Cornet v. Winton* (Tenn.) 2 Yerg. 143; *Blair v. Pathkiller* (Tenn.) 2 Yerg. 407; *Jones v. Evans* (Tenn.) 5 Yerg. 323, 334; *Strother v. Cathey*, 5 N. C. 162 (3 Am. D. 683); *Doe dem. Eu-che-lah v. Welch*, 10 N. C. (3 Hawks) 155.

The North Carolina act of 1783, reserving the Cherokee area to the Indians and forbidding entries thereon, was nothing more than a legislative recognition of the Indian right of occupancy and of the obligation to respect it until it was voluntarily relinquished. (Cf. *Lattimer v. Poteet*, 14 Pet. 4, 14.)

It follows that the underlying fee in these lands passed to the United States by the cession of North Carolina in 1789 and from the United States to Tennessee by the cession of 1806, and that the treaty of New Echota, by which the Indians relinquished their lands to the United States, had the effect merely of relieving these lands of the burden of the Indian occupancy and vested nothing in the General Government.

This was the contemporaneous construction of the treaty by all the parties interested.

The United States have never asserted title to these lands, and no entries have been made on them under Federal laws.

As soon as the Indian titles were extinguished by the various treaties concluded between the United States and the Indians the States of North Carolina, Tennessee, Georgia, and South Carolina, within whose limits the Cherokee lands lay, passed laws under which the lands ceded were entered and granted.

Chapter 59 of the acts of Tennessee, 1819, provides for the survey of "the lands lately acquired by treaty from the Cherokee tribe of Indians * * * to which the Indian title has been extinguished," and provision is made for the sale of them by the State. (Whitney Land Laws, Tenn. 386.)

Chapter 2 of the acts of 1836, Tennessee, provides "that the public lands of the State, ceded by the Cherokee nation of Indians to the United States by the treaty of May 23, 1836, shall constitute a surveyor's district," and provision is made for the survey of lands therein by the State of Tennessee. By the act of November 20, 1837, chap. 2, provision was made for the sale of these lands. (Whitney Land Laws, Tenn. 436, 440.)

After the passage of these acts the State issued grants covering all the lands within the Cherokee country and upon them the title to the property of the people of several populous counties depends. (*Gillespie v. Cunningham*, 2 Humph. (Tenn.) 21; *Blair v. Pathkiller*, 2 Yerg. (Tenn.) 407; *Henegar v. Seymour*, 93 Tenn. 253, 254; *Bealmear v. Hutchins*, 148 Fed. 545, 548.)

I am therefore of opinion that the State of Tennessee was empowered to make the grants in question and that a valid title may be deraigned therefrom.

Respectfully,

J. C. McREYNOLDS.

TO THE SECRETARY OF AGRICULTURE.

OPINIONS
OF
HON. THOMAS WATT GREGORY, OF TEXAS.

APPOINTED AUGUST 29, 1914.

CENSORSHIP OF RADIO STATIONS.

The President has authority to maintain a Government censorship in radio stations, and may, through the Secretary of the Navy or any other appropriate department, close down, or take charge of and operate, such plants, should he deem it necessary in securing obedience to his proclamation of neutrality of August 5, 1914.

DEPARTMENT OF JUSTICE,

September 16, 1914.

SIR: I have the honor to acknowledge receipt of your letter of September 12, 1914, inclosing copy of certain correspondence with the Navy Department and of a letter dated September 9, 1914, addressed to the Secretary of the Navy by John W. Griggs, as president of the Marconi Wireless Telegraph Co. of America. I have also received from the Navy Department a letter from Mr. Griggs dated August 19, 1914.

I have given the above my careful consideration.

On August 5, 1914, the President issued an Executive order prohibiting all radio stations within the jurisdiction of the United States "from transmitting or receiving for delivery messages of an unneutral nature and from in any way rendering to any one of the belligerents any unneutral service during the continuance of hostilities."

The President directed the Secretary of the Navy to enforce this order, delegating to him the requisite authority. For its adequate enforcement it was deemed necessary that to some degree a Government censorship should be established in radio stations, and instructions to that end were issued by the Secretary of the Navy.

Apparently, this censorship was acquiesced in by the Wireless Co. as a fair solution of the problem involved.

The Marconi Wireless Telegraph Co. of America now complains of the administration of the censorship; questions the right of the Secretary of the Navy to institute it; and invites argument as to the legality of the right asserted.

The President of the United States is at the head of one of the three great coordinate departments of the Government. He is Commander in Chief of the Army and the Navy. In the preservation of the safety and integrity of the United States and the protection of its responsibilities and obligations as a sovereignty, his powers are broad. In the words of Mr. Justice Miller in *In re Neagle* (1890), 135 U. S. 64, his power includes the enforcement of "the rights, duties, and obligations growing out of the Constitution itself, our international relations, and all the protection implied by the nature of the Government under the Constitution."

If the President is of the opinion that the relations of this country with foreign nations are, or are likely to be, endangered by actions deemed by him inconsistent with a due neutrality, it is his right and duty to protect such relations; and in doing so, in the absence of any statutory restriction, he may act through such executive officer or department as appears best adapted to effectuate the desired end. The act of such executive officer or department in such case is the act of the President; a denial of the officer's authority is a denial of the President's power.

The powers above outlined are not novel; they have been exercised in numerous emergencies by Presidents of the United States; and, whenever their exercise has been attacked in legal proceedings, their validity has, with hardly an exception, been upheld by the courts. Such powers intrusted to the President are of a fundamental nature, exerted to maintain or preserve the security of the Nation, and subject to that high responsibility to which the Executive is held by the American people; they are not likely to be abused, and not without the gravest reasons are the courts likely to withhold their sanction.

The act of August 13, 1912 (37 Stat. 302), known as the radio act, provides additional authority for the use or control of any radio station by any department of the Government in time of war, or public peril or disaster.

It is unnecessary to comment on the perils of the present international situation, and it is easy to see that an agency such as the wireless stations along our coast is capable of creating international complications of the gravest character. Their use is novel; their possibilities are extraordinary; and the ease with which belligerents can be instantly notified of the movement of vessels and given other important information is perfectly apparent.

The system of censorship heretofore adopted seems reasonable and a fair solution of a critical situation. It interferes but slightly with the operation of the plant, and the Marconi Co. should cheerfully bear with this inconvenience in recognition of its own interest in the general welfare.

In case it becomes inadvisable for any reason to continue the censorship, I do not hesitate, in view of the extraordinary conditions existing, to advise that the President, through the Secretary of the Navy or any other appropriate department, close down, or take charge of and operate, the plant in question, should he deem it necessary in securing obedience to his proclamation of neutrality.

Respectfully,

TO THE SECRETARY OF STATE.

T. W. GREGORY.

ANNUAL REPORT OF THE COMMISSIONER OF EDUCATION—
FURNISHING COPY TO PUBLIC PRINTER.

The annual report of the Commissioner of Education required by section 518 of the Revised Statutes is not within the operation of section 7 of the sundry civil appropriation act of August 1, 1914 (38 Stat. 680), which limits the time within which heads of executive departments or other branches of the public service shall furnish copies of their annual reports and accompanying documents to the Public Printer.

DEPARTMENT OF JUSTICE,

September 21, 1914.

SIR: I have the honor to acknowledge your letter of the 28th ultimo, wherein you request my opinion as to whether

the annual report required by section 518, Revised Statutes, to be furnished Congress by the Commissioner of Education is within the operation of section 9 of the act of Congress of August 1, 1914 (38 Stat. 680), (making appropriations for the sundry civil expenses, etc.), reading:

"Sec. 9. Appropriations herein for printing and binding shall not be used for any annual report or the accompanying documents unless the head of each executive department, or other branch of the public service, or the Commissioners of the District of Columbia making such a report shall furnish copy to the Public Printer in the following manner: Copies of the documents accompanying such annual reports on or before the fifteenth day of October of each year; copies of the annual reports on or before the fifteenth day of November of each year; and complete revised proofs of the accompanying documents and the annual reports on the tenth and twentieth days of November of each year, respectively. The provisions of this section shall not apply to the annual reports of the Smithsonian Institution."

You quoted the above section incorrectly. It is correctly quoted here.

I am of the opinion that it is not, and for these reasons:

1. The words "the head of each" modify not only "executive department" but also "other branch of the public service." So paraphrased, the clause to be interpreted would read:

"* * * unless the head of each executive department, or the head of each other branch of the public service, * * *" etc.

The Bureau of Education to which the commissioner belongs is itself a part of, or within an executive department, viz, the Department of the Interior. (Sec. 516, Rev. Stats.). The Secretary is the head of every bureau in his department. The force of the section being limited to the heads only, his report only, and not that of a subordinate bureau, is reached by the section.

2. The word "other" in the clause is used in the sense of "different from those which have been specified," i. e.,

to express a difference. (*Hyatt v. Allen*, 54 Cal. 353; *Diamond Match Co. v. Ontonagon*, 188 U. S. 82, 92.) Thus paraphrasing it the clause would read:

"* * * unless the head of each executive department, or the head of each branch of the public service different from those branches which have been specified, * * *" etc.

The Bureau of Education is a branch of the public service, but being a branch or bureau within the Department of the Interior it can not be a branch different from the Interior Department. In *United States v. Germaine* (99 U. S. 508-511) the court said:

"The association of the words 'heads of departments' with the President and the courts of law strongly implies that something different is meant from the inferior commissioners and bureau officers, who are themselves the mere aids and subordinates of the heads of the departments."

The specific exception in the final clause (Smithsonian Institution) represents a branch of the public service not related to any executive department.

This conclusion is not affected by the fact that as section 9 was originally introduced it, in terms, purported to amend section 196, Revised Statutes, and was recast in its present form on account of the point of order made in the House. (Cong. Rec., p. 12070.) Section 196 was enacted in 1864 and is limited to "heads of executive departments," while section 518 was not enacted until 1867, so that the latter was never affected by the former.

Section 9 accords with the debates, wherein the Member having the bill in charge explained the section as follows:

"The purpose is to enable Members of Congress to obtain copies of annual reports of the various heads of departments some time before the adjournment of Congress." (Cong. Rec. p. 12069. See also p. 12070.)

I note your statement as to the matter contained in the report of the commissioner, and the practical impossibility of assembling the data within the time prescribed by section 9, and the further fact that the commissioner

makes an independent bureau statement annually to his department head, which appears in the annual report of the Secretary. In view of the conclusion I reach, it is not necessary to consider what effect, if any, these features would have.

The two printed volumes of the commissioner's report for 1913 are returned herewith.

Respectfully,

T. W. GREGORY.

To the SECRETARY OF THE INTERIOR.

ANNUAL REPORT OF COMMISSIONER OF PATENTS—FURNISHING COPY TO PUBLIC PRINTER.

The annual report of the Commissioner of Patents required by section 494 of the Revised Statutes is not within the operation of section 9 of the sundry civil appropriation act of August 1, 1914 (38 Stat. 680), relating to the time within which the annual reports and accompanying documents of the heads of executive departments and other branches of the public service shall be furnished to the Public Printer.

DEPARTMENT OF JUSTICE,

September 21, 1914.

SIR: I have the honor to acknowledge your letter of the 3d instant wherein you ask my opinion as to whether the annual report required by section 494, Revised Statutes, reading—

“SEC. 494. The Commissioner of Patents shall lay before Congress, in the month of January, annually, a report, giving a detailed statement of all moneys received for patents, for copies of records or drawings, or from any other source whatever; a detailed statement of all expenditures for contingent and miscellaneous expenses; a list of all patents which were granted during the preceding year, designating under proper heads the subjects of said patents; an alphabetical list of all the patentees, with their places of residence; a list of all patents which have been extended during the year; and such other information of

the condition of the Patent Office as may be useful to Congress or the public."

is within the operation of section 9 of the act of Congress of August 1, 1914 (38 Stat. 680), (making appropriations for the sundry civil expenses, etc.) reading—

"SEC. 9. Appropriations herein for printing and binding shall not be used for an annual report or the accompanying documents unless the head of each executive department, or other branch of the public service, or the Commissioners of the District of Columbia, making such a report shall furnish copy to the Public Printer in the following manner: Copies of the documents accompanying such annual reports on or before the fifteenth day of October of each year; copies of the annual reports on or before the fifteenth day of November of each year; and complete revised proofs of the accompanying documents and the annual reports on the tenth and twentieth days of November of each year, respectively. The provisions of this section shall not apply to the annual reports of the Smithsonian Institution."

You quoted the above section incorrectly. It is correctly quoted here.

I am of the opinion that it is not. The reasons for this view are fully set forth in my communication to you under date of September 21, 1914, involving the report of the Commissioner of Education, within the Interior Department, and those reasons will not be repeated here.

In addition, it may be said that section 494, Revised Statutes, calls for a report that must cover the preceding calendar year, and can only be made in January, or at some later date following the expiration of the calendar year; and the purpose of section 9 was not to postpone the making of reports but rather to expedite them and was, in my opinion, limited to those classes of reports which hitherto had been, and, therefore, could be assembled so as to meet the requirements of section 9.

Respectfully,

T. W. GREGORY.

TO THE SECRETARY OF THE INTERIOR.

ELIGIBILITY OF RETIRED NAVAL OFFICER TO APPOINTMENT AS COMMERCIAL ATTACHÉ.

A retired naval officer whose compensation as such amounts to \$2,500 per annum is ineligible to appointment as a commercial attaché under the provisions of the act of July 16, 1914 (38 Stat. 500), making appropriations for the legislative, executive, and judicial expenses of the Government.

DEPARTMENT OF JUSTICE,
September 26, 1914.

SIR: I have the honor to acknowledge the receipt of your letter of September the 23d, in which you ask my opinion as to whether or not a retired naval officer "is eligible to appointment as a commercial attaché, under the provisions of the act of Congress entitled, 'An act making appropriations for the legislative, executive, and judicial expenses of the Government for the fiscal year ending June 30, 1915, and for other purposes,' approved July 16, 1914 (38 Stat. 500), notwithstanding the act of July 31, 1894, section 2. (28 Stat. 205.)"

The pertinent part of section 2 of the act of July 31, 1894, is as follows:

"No person who holds an office the salary or annual compensation attached to which amounts to the sum of two thousand five hundred dollars shall be appointed to or hold any other office to which compensation is attached unless specially heretofore or hereafter specially authorized thereto by law; but this shall not apply to retired officers of the Army or Navy whenever they may be elected to public office or whenever the President shall appoint them to office by and with the advice and consent of the Senate."

The statute creating the position of commercial attaché provides:

"Commercial attachés, Department of Commerce:—For commercial attachés, to be appointed by the Secretary of Commerce, after examination to be held under his direction to determine their competency, and to be accredited

through the State Department, whose duties shall be to investigate and report upon such conditions in the manufacturing industries and trade of foreign countries as may be of interest to the United States; and for one clerk to each of said commercial attachés to be paid a salary not to exceed \$1,500 each; and for necessary traveling and subsistence expenses, rent, purchase of reports, travel to and from the United States, and all other necessary expenses not included in the foregoing; such commercial attachés shall serve directly under the Secretary of Commerce and shall report directly to him, \$100,000."

I understand from your letter, and therefore assume, the facts are as follows:

A naval officer, retired from active service but not "wholly retired from the service," receiving from the Government more than \$2,500 a year, desires to be appointed commercial attaché. He has not been specially authorized by law to accept such position, but has satisfactorily passed the required examination and will be appointed unless prohibited by law. Commercial attachés constitute a class of functionaries who receive salaries ranging from \$4,000 to \$5,000 per annum. Their duties are to investigate and report on such conditions in the manufacturing industries as they may deem of interest to the United States and to investigate commercial questions with a view to increasing the foreign commerce of the United States with the countries to which they are accredited. Their function is not to make particular and designated investigations and reports, the completion of which will terminate their employment, but, as a continuing occupation, to make investigations and render reports when and as occasion, in their opinion, may demand. The position and duties to be performed do not cease with the termination of the incumbent's employment, but continue and pass to his successor.

A retired naval officer is, within the meaning of the statute providing against dualism in office, an officer of the United States. (*United States v. Tyler*, 105 U. S. 244;

29 Op. 397.) The language of the statute manifests the intention of Congress to make it applicable to retired naval officers, since it provides that such officials may hold certain designated offices and consequently by implication excludes them from all other offices to which compensation is attached.

It only remains, therefore, to determine whether or not the position of commercial attaché is also an office in the sense in which the term is used in said statute. The Supreme Court of the United States have defined the term as follows:

"An office is a public station, or employment, conferred by the appointment of government. The term embraces the ideas of tenure, duration, emolument and duties." (*United States v. Hartwell*, 6 Wall, 385, 393.)

The position of commercial attaché is one that embraces the ideas of tenure, duration, emolument, and duties. The duties are continuing and permanent and not occasional or temporary.

The definition given the word "office" by the Supreme Court, therefore, includes the position of commercial attaché. Such position also falls within the strict definition of a constitutional office, since the appointment is made by the head of a department pursuant to an enactment of Congress, thereby conforming to section 2 of article 2 of the Constitution. (*United States v. Mouat*, 124 U. S. 303, 307.)

In my opinion, therefore, a commercial attaché, performing the functions above described, is an officer within the meaning of said statute, and the retired naval officer herein referred to can not be legally appointed to and hold such office while retaining his position and compensation as such naval officer.

Respectfully,

T. W. GREGORY.

TO THE SECRETARY OF COMMERCE.

CONTRACTS—WAIVER OF PERFORMANCE—INCREASED
PRICE OF SUPPLIES.

The Secretary of the Treasury has no authority to relieve a contractor from the performance of his contract to furnish supplies to the Government, because of the increased price thereof incident to the European war.

DEPARTMENT OF JUSTICE,
October 22, 1914.

SIR: I have the honor to acknowledge your personally signed letter of the 13th, wherein you submit a question "of law which has actually arisen in the administration of this department as to whether the *Secretary* of the Treasury has *authority* under the law to relieve the company from further performance of contract."

Your assistant asked whether *any* relief may be granted "the company." To have answered the latter question would have given advice as to the private rights of "*the company*" which I am by law, expressly prohibited from doing. (20 Op. 500; 28 Op. 534.) You will pardon my calling attention to the fact that the question you now submit is an altogether different one from that propounded by your subordinate.

I assume from your language that your department has determined to relieve the company from further performance of the contract in case it has the necessary authority, and I act upon this assumption in rendering this opinion.

Your inquiry relates to your power as Secretary to act as indicated. Your letter, as well as that of the Assistant Secretary, approved by you, characterizes the transaction with Miller, Claggett & Co. as a "contract," though the attached petition from Miller, Claggett & Co. emphasizes the fact that they did not sign the "contract" or bond tendered them for execution. No copies of the advertisements or proposals or acceptance are furnished. If the arrangement was one within the operation of the act of June 2, 1862 (12 Stat. 411; secs. 512, 513, 3744 to 3747, Rev. Stat.), a signed written contract would be essential; and for want thereof no binding obligation would have been assumed by Miller, Claggett & Co. (*Clark v. United States*, 95 U. S. 539, 542; *S. B. Iron Co. v. United States*,

NOTE.—The opinion of Oct. 14, 1914, was temporarily withheld from publication and later released. See p. 344.

118 U. S. 37, 40, 42; *Monroe v. United States*, 184 U. S. 524, 527 et seq.; *St. Louis Hay Co. v. United States*, 191 U. S. 159, 163.)

Ordinarily, an acceptance of a bid made pursuant to proposals would create a binding contract, even though a formal contract was to be later signed. (*Equitable Ins. Co. v. Hearne*, 20 Wall. 494-496; *Garfield v. United States*, 93 U. S. 242, 246; *Harvey v. United States*, 105 U. S. 671, 688.) But the language of the advertisement or bid or acceptance might qualify the foregoing result, as for example, if the latter provided that neither party should be bound until formal contract and bond were executed.

I assume in the instant case that despite the nonexecution of contract and bond an agreement was consummated by the acceptance of the proposal to furnish supplies.

1. The petition for relief is based on the increase of price of contract supplies, caused by the European war since the acceptance of the proposal. It is not pretended that the supplies can not be furnished at some price; and, of course, it is not claimed that this Government was in any way responsible for the war and resultant increase in price.

If the firm in question has made a contract, it is obligated to perform it if performance be physically possible. (4 Encly. of United States Supreme Court Reports 385-6-7, and cases cited.) Of the grounds here urged for suspension or release of liability, the court in *Smoot's case*, 15 Wall. 36, 45, said:

"There is a * * * constant and ever-recurring attempt to apply to contracts made by the Government and to give to its action under such contracts, a construction and an effect *quite different* from those which courts * * * are accustomed to apply to contracts between individuals. There arises * * * a sense of the power and resources of this great Government, prompting appeals to its magnanimity and generosity, etc. These are addressed in vain to this court. *Their proper theater* is the *Halls of Congress*, etc. * * * contracts to which the United States is a party in the same sense in which an individual might be, and to which the ordinary principles of contracts *must and should apply*. * * *

"As between individuals, the impossibility which releases a man from the obligation to perform his contract must be a real impossibility and not a mere inconvenience. (46.)"

The existing hardship gives no *right*, then, to the contractor to void the obligation of his contract.

2. No executive officer of the United States has power to suspend, rescind, or relieve from the obligation of a valid contract when either would be detrimental to the United States. (8 Compt. Dec. 106.) This is true, however burdensome performance may be—especially where the added burden is not caused by the United States. In all such cases relief must be sought of Congress. Of all branches of Government, that body *alone* has power to recognize a moral claim for relief. It acts under the "debt-paying" power. (*United States v. Corliss Steam Engine Co.*, 91 U. S. 321; *United States v. Realty Co.*, 163 U. S. 427; *Smoot's case*, 15 Wall. 36, 45.)

The "Glove case," 28 Op. 124, was confessedly a "doubtful case," and is distinguished in that the Government had, *by its own act*, increased the cost of materials to the contractor. (*Dermott v. Jones*, 2 Wall. 1, 9.) Otherwise it could secure supplies for nothing, by making its revenue from the tax equal to the contract price of supplies taxed. In the *Snyder* case (12 Op. 112), a privilege to terminate for delay had accrued. No damage had ensued from the delay; and the contractor desired to finish the contract. Held, the executive officer could waive the forfeiture and *permit the contractor to finish*. 2 Op. 485 is not in point.

I can not believe any court would lodge so large a power in an executive department without express declaration of Congress. And even against such declaration would remain the question whether its "debt-paying" power is not exclusive and nondelegable. No attempt to delegate having hitherto been made, any contractor, burdened by war conditions, must fulfill his contract and seek relief from Congress.

Respectfully,

T. W. GREGORY.

TO THE SECRETARY OF THE TREASURY.

FEDERAL RESERVE BANKS.

That portion of section 15 of the Federal reserve act of December 23, 1913 (38 Stat. 265), reading: "No public funds of the * * * postal savings * * * shall be deposited, in the continental United States, in any bank not belonging to the system established by this act," does not take effect until after a reserve bank has been authorized by the comptroller to "commence business" in the district and the Secretary "shall have officially announced" its establishment.

Funds of the postal savings on deposit elsewhere at the time that the above clause becomes operative, need not be then transferred to, and redeposited in, a member or reserve bank.

DEPARTMENT OF JUSTICE,

November 7, 1914.

SIR: I have the honor to acknowledge and answer your letter of September 26, 1914, wherein you ask: (1) When that portion of section 15 of the Federal reserve act of December 23, 1913 (38 Stat. 265), reading: "No public funds of the * * * postal savings * * * *shall be deposited*, in the continental United States, in any *bank not belonging to the system established by this act*," takes effect; and (2) whether funds of the postal savings on deposit elsewhere at the time that the above clause becomes operative, *must* be then transferred to, and redeposited in, a reserve or member bank.

To your *first question* I answer:

Not until after a reserve bank has been authorized by the comptroller to "commence business" in the district (sec. 4) and the Secretary "shall have officially announced" its establishment. (Sec. 19.) My reasons for so answering are:

Receiving deposits is transacting business, and so the reserve bank could not receive them until so authorized to commence business. A bank may become a subscribing member either before or after the organization of its district reserve bank (definition of "member bank," secs. 1, 9, 19).

But the clause of section 15 in question does not read: "In any bank except reserve banks authorized to do business, or member banks," but rather "in any bank not belonging to the system established by this act." And the system is first established in any district when, pursuant

to section 19, "the Secretary of the Treasury *shall have officially announced*, in such manner as he may elect, *the establishment of a Federal reserve bank in any district.*"

And, of course, a bank can not be said to belong to the system established until a system has been in fact established. Then, and not until then, does the prohibition in question become operative. The view here expressed accords with the administrative ruling of the Treasury Department. (Letter of Secretary McAdoo to Hine, president of the New York Clearing House Association, dated June 11, 1914.)

To your *second question* I answer "No," and for these reasons:

The present section 15 was altered to its present form by the Senate committee. To understand the changes, we may adopt the reprint in the report of that committee, wherein is shown the original draft, with indications by parentheses of the portions struck out and by underscoring of the matter inserted, as follows:

"GOVERNMENT DEPOSITS.

"SEC. 16. (That all) *the monies* (now) held in the general fund of the Treasury, except the five per centum fund for the redemption of outstanding national-bank notes, *and the funds provided in this act for the redemption of Federal reserve notes* (shall) *may*, upon the direction of the Secretary of the Treasury, (within twelve months after the passage of this act) be deposited in Federal reserve banks, which banks (shall), *when required by the Secretary of the Treasury shall* act as fiscal agents of the United States; and (thereafter) the revenues of the Government, *or any part thereof* (shall) *may* be (regularly) deposited in such banks, and disbursements (shall) *may* be made by checks drawn against such deposits.

"*No public funds of the Philippine Islands, or of the postal savings, or any Government funds, shall be deposited in the continental United States in any bank not belonging to the system established by this act; provided, however, That nothing in this act shall be construed to deny the right of the Secretary of the Treasury to use member banks as depositaries.*

“(The Secretary of the Treasury shall, subject to the approval of the Federal Reserve Board, from time to time, apportion the funds of the Government among said Federal reserve banks, distributing them, as far as practicable, equitably between the different sections, and may, at their joint discretion, charge interest thereon, and fix from month to month, a rate which shall be regularly paid by the reserve bank holding such deposits; Provided: That no Federal reserve bank shall pay interest upon any deposits except those of the United States.

“(No Federal reserve bank shall receive or credit deposits except from the Government of the United States, its own member banks, and, to the extent permitted by this act, from other Federal reserve banks. All domestic transactions of the Federal reserve banks involving loans made by such banks, rediscount operations or the creation of deposit accounts, shall be confined to the Government and the depositing and Federal reserve banks, with the exception of the purchase or sale of Government or State securities, or of gold coin or bullion)”. (Senate committee Report No. 133, pt. 2, pp. 51-52, 63d Cong., 1st sess.).

In passing, it may be noted—though the matter is entirely immaterial—that the report was in error in italicizing the word “monies” in the first line of the section, since this word appeared in the original and in every succeeding draft of the measure. (S. Doc. No. 242, 63d Cong., 1st sess., p. 62.)

Of the section as it stood before their change, the committee (Rep., p. 5) said:

“The Government of the United States was required absolutely *to deposit all of its general funds* with the national reserve association, and its branches, *after* the organization of the association, and *thereafter all* receipts of the Government except its trust funds.”

While of the purpose of the change it said (Rep., pp. 26-27):

“It has been deemed of the highest importance to maintain the Independent Treasury of the United States, *and not compel* the Secretary of the Treasury *to deposit every dollar* of the public funds in the Federal reserve banks, *but to provide that he may do so.* * * * The Government of the United States can advantageously to the banks

and to itself, place with the Federal reserve banks \$150,000,000, or even a larger sum, *but the process of collecting the revenue, through revenue collectors scattered throughout the Nation, making local deposits, and the right of the Treasury Department to make disbursements in every part of the country, through its numerous disbursing officers, makes it highly necessary to maintain the independence of the Treasury. We have therefore thought it proper to change the provision of section 16 in such a way as to accomplish this object* (p. 46)."

The section in its original form, with a purpose of destroying the "Independent Treasury," *compelled* a transfer of all funds on hand—to be wholly accomplished within 12 months from the passage of the act. That period was altered to avoid the shock of a sudden transfer of all existing public deposits. (H. Rept. No. 69, p. 53, 63d Cong., 1st sess.) The change as to all funds under his control left it wholly optional with the Secretary whether he should ever transfer. Manifestly there was no purpose of expediting the transfer.

The policy observed as to funds under control of the Secretary of the Treasury was meant to be applied also to the funds of the postal savings, which are under the control of the Postmaster General. The committee had no thought of distinguishing between funds. Theirs was a general policy to preserve an "Independent Treasury," not to strengthen the claim of system banks to the use of the funds.

The words "shall be deposited," as used in the original draft, could only mean an affirmative act of *future* deposit. I must assume they were used with like meaning in the committee's amendment. Moreover, the ordinary meaning of the transitive verb "deposit" is, "to place or lodge for safe-keeping; to place in some repository; to commit to the care of anyone; to place for care or custody; to lodge in trust." (3 Oxford Dict. 215; Century Dict. 1545.) They should not be read as "shall be allowed to remain on deposit."

Respectfully,

T. W. GREGORY.

TO THE POSTMASTER GENERAL.

FEDERAL RESERVE BOARD—TREASURY DEPARTMENT.

Moneys received by the Federal Reserve Board, under section 10 of the Federal reserve act of December 23, 1913 (38 Stat. 261), are "public moneys" within the meaning of the auditing statutes, and consequently are subject to audit by one of the auditors of the Treasury Department.

It was the purpose of the Federal reserve act to insure the preservation and supremacy of all existing powers of the Secretary of the Treasury in all cases where it might be claimed that such powers overlapped or conflicted with those of the Federal Reserve Board, but that act clearly recognized the existence of powers of the board independent of the Secretary in cases where no such conflict existed.

DEPARTMENT OF JUSTICE,
November 16, 1914.

SIR: I have the honor to acknowledge your letter of October 29, 1914, wherein you request my opinion (a) whether accounts of moneys derived from the semiannual assessment to be levied on Federal reserve banks by the Federal Reserve Board are subject to audit by one of the auditors of the Treasury Department, and (b) as to the status of the Federal Reserve Board, particularly with reference to the Treasury Department.

Section 10 of the "Federal reserve act" of December 23, 1913 (38 Stat. 261), (the act authorizing the assessment), provides:

"The Federal Reserve Board shall have power to levy semiannually upon the Federal reserve banks, in proportion to their capital stock and surplus, an assessment sufficient to pay its estimated expenses and the salaries of its members and employees for the half year succeeding the levy of such assessment, together with any deficit carried forward from the preceding half year."

The answer to your first question depends on whether the moneys so levied by the Federal Reserve Board are, when received, "public moneys." If so, they are clearly to be audited under sections 7 and 10 of the act of July 31, 1894 (28 Stat. 206, 208), either by the auditor provided for in the first paragraph of said section 7 or by the auditor provided in the fifth paragraph, such paragraphs (so far as material) reading as follows:

First. "The Auditor for the Treasury Department shall receive and examine all accounts of salaries and incidental expenses of the office of the Secretary of the Treasury and all bureaus and offices under his direction, all accounts relating to * * * and all other business within the jurisdiction of the Department of the Treasury and certify the balances arising thereon to the Division of Bookkeeping and Warrants."

Fifth. "The Auditor for the State and Other Departments shall receive and examine all accounts of * * * and accounts of all boards, commissions and establishments of the Government not within the jurisdiction of any of the executive departments. He shall certify the balances arising thereon to the Division of Bookkeeping and Warrants."

Section 10 (so far as material) provides for a division of bookkeeping and warrants, and that—

"Upon the books of this division shall be kept all accounts of receipts and expenditures of public moneys," etc.

Reference is also to be made to the act of February 19, 1897 (29 Stat. 550), reading (so far as material) as follows:

"All books, papers, and other matters relating to the office of accounts of * * * commissions, boards, and establishments of the Government in the District of Columbia, shall at all times be subject to inspection and examination by the Comptroller of the Treasury and the Auditor of the Treasury authorized to settle such accounts, or by the duly authorized agents of either of said officials."

(This statute plainly applying to boards, etc., located within the District of Columbia, rather than to boards of the District government, and the Federal Reserve Board being located within the District.)

I am of opinion that moneys received by the Federal Reserve Board, under section 10 of the act of December 23, 1913, are "public moneys" within the meaning of these auditing statutes, for the following reasons, among others:

(1) The assessments are levied by a board whose members in respect to appointment, tenure, duties, and compen-

sation meet all requirements of the definition of "public officers" and "officers of the United States."

(2) The assessments are levied by such officers pursuant to the provision of a Federal statute and are devoted to the payment of official salaries and the expenses of this official board.

(3) These moneys, after collection, are no longer the property of the paying banks, and must be viewed as moneys belonging to the United States, and therefore public moneys as defined by the Supreme Court of the United States in *Branch v. United States* (100 U. S. 673). In *United States v. Bromley* (12 How. 88, 97) it was held, that postal collections from stamp sales are public revenues:

"The revenue of the Post Office Department being raised by a tax on mailable matter conveyed in the mail, and which is disbursed in the public service, is as much a part of the income of the Government as moneys collected for duties on imports."

The analogy is marked, for the reason that in like manner as the money assessed by the Federal Reserve Board is for the special purpose of meeting the salaries and expenses of the board, so the use of the postal collections is confined to sustaining the specific service by and in which they are collected.

(4) Other provisions of the Federal reserve act (secs. 11c and 16), dealing with interest charges, taxes, and penalties, can only be satisfied by deposit in the Treasury of the levies, taxes, and penalties so imposed, and there seems to be no logical ground for distinction between such assessments and the ones in question. The idea of necessary public control is also strengthened by the requirements of Revised Statutes section 3639.

The moneys received by the Federal Reserve Board under section 10 of the act of December 23, 1913, being thus, in my opinion, public moneys and consequently subject to audit by one of the auditors of the Treasury Department, the question is then directly presented under which paragraph of the act of July 31, 1894, *supra*, the audit is to be made. This involves the further question

on which you have asked my opinion, namely, whether the Federal Reserve Board is an independent board, commission, or Government establishment, or whether it is a bureau, office, or division or otherwise a part of the Treasury Department.

That the Federal Reserve Board is a "board" or "establishment" of the Government within the meaning and intent of those words as used in the fifth paragraph of section 7 of the act of July 31, 1894, is plain from the provisions of the Federal reserve act and the explanation of the status of the board contained in the reports accompanying the original bills in Congress. This conclusion is sustained by reason and analogy, when reference is had to the considerable number of boards or establishments of far less general or national scope which have been so esteemed and uniformly treated. (See Report of Joint Commission to Inquire into Executive Departments, October 9, 1893. House Reports, 1st sess., 53d Cong., Report No. 88.)

Consideration of the history of the Federal reserve bank act, of the general scheme of the whole act, of the functions to be performed by the Federal Reserve Board, and of the method of their performance, leads me to the clear opinion that the board is an independent board or Government establishment.

The Federal Reserve Board is not merely a supervisory, but is a distinctly administrative board with extensive powers. It is described as follows in the report of the Committee on Banking and Currency to the House of Representatives (63d Cong., 1st sess., Report No. 69):

Page 16. "In order that these banks may be effectively inspected, and in order that they may pursue a banking policy which shall be uniform and harmonious for the country as a whole, the committee proposes a general board of management *intrusted with the power to overlook and direct* the general functions of the banks referred to. To this it assigns the title of "The Federal Reserve Board."

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Page 18. "The only factor of centralization which has been provided in the committee's plan is found in the Federal Reserve Board, which is to be a strictly Government organization created for the purpose of inspecting existing banking institutions and of regulating relationships between Federal reserve banks and between them and the Government itself." * * *

Page 42. "Section 11. In this section provision has been made for the creation of a general board of control acting on behalf of the National Government * * *."

The report of Senator Owen from the Senate Committee on Banking and Currency (63d Cong., 1st sess., Report 133, part 2) says merely:

"The Federal Reserve Board, consisting of the Secretary of the Treasury and six members appointed by the President of the United States and confirmed by the Senate for terms of six years, are given the following powers: " (Here follows an enumeration of powers.)

The broad functions outlined in these reports are assigned to the board in 12 subdivisions of section 11 of the act giving to it certain powers and authority, and in various other sections containing specific grants of authority to exercise about 40 other powers. Moreover, in subdivision (i) of section 11 the all-embracing requirement appears that "said board shall perform the duties, functions, or services specified in this act, and make all rules and regulations necessary to enable said board effectively to perform the same."

The act further contains no express provision that the Federal Reserve Board shall be considered as a bureau, division, or office of the Treasury Department—a significant omission in view of the fact that Congress had under consideration a bureau of that department when, in section 16, it amended the Revised Statutes relative to that "bureau," of which the Comptroller of the Currency was the "chief officer;" and the provision in section 10 that "the Secretary of the Treasury may assign offices in the Department of the Treasury for the use of the Federal Reserve Board" (a provision added to the House bill by the Senate committee), would be highly superfluous if the Board were

a bureau of that department for which the Secretary already possessed complete authority to assign offices in his own departmental buildings.

The history of the bill develops the following facts of significance:

In section 11 of H. R. 7837 (sec. 10 of the act) it is provided—

“The manager of the Federal Reserve Board, subject to the supervision of the Secretary of the Treasury and Federal Reserve Board, shall be the executive officer of the Federal Reserve Board.”

This clearly contemplated that the Secretary of the Treasury and the Federal Reserve Board were distinct entities.

In the act as passed (sec. 10) the supervision of the Secretary of the Treasury is stricken out, leaving the governor (manager) subject only to supervision of the Board.

In section 16 of H. R. 7837 (sec. 16 of the act) it is provided—

“The Secretary of the Treasury shall, *subject to the approval of the Federal Reserve Board*, from time to time apportion the funds of the Government among the said Federal reserve banks, distributing them, as far as practicable, equitably between different sections * * *.”

This also clearly contemplated the Secretary and the board as co-ordinate officials. The whole provision was stricken from the act as passed, but nothing was substituted for it.

In section 11 of H. R. 7837 (sec. 10 of the act) the Comptroller of the Currency was to perform his duties “under the general direction of the Secretary of the Treasury *acting as chairman of the Federal Reserve Board.*”

In the act as passed the words “acting as chairman of the Federal Reserve Board” were stricken out, showing an intention to distinguish clearly between placing the Comptroller under the Secretary as head of the Treasury Department and the Secretary as ex officio chairman of the Board.

The most significant change made in H. R. 7837 by the act as passed was the insertion, in section 10 of the act, of the following clause:

"Nothing in this act contained shall be construed as taking away any powers heretofore vested by law in the Secretary of the Treasury which relate to the supervision, management, and control of the Treasury Department and bureaus under such department, and wherever any power vested by this act in the Federal Reserve Board or the Federal reserve agent appears to conflict with the powers of the Secretary of the Treasury, such powers shall be exercised subject to the supervision and control of the Secretary."

It is evident that while the purpose of this clause was, amongst other things, to insure the preservation and supremacy of all existing powers of the Secretary of the Treasury in all cases where it might be claimed that such powers overlapped or conflicted with those of the Federal Reserve Board, nevertheless by this very provision the act clearly recognized the existence of powers of the Board independent of the Secretary in cases where no such conflict existed.

Very respectfully,

T. W. GREGORY.

TO THE SECRETARY OF THE TREASURY.

PRESIDENT—RECESS APPOINTMENT—POSTMASTER.

A vacancy in a postmastership having occurred during the session of the Senate and the Senate having failed to confirm an appointment, the President may then appoint a person to fill the vacancy, by temporary commission, to expire at the end of the next session of the Senate.

The question as to whether the appointee can be paid the salary of the office before confirmation by the Senate should be referred to the Comptroller of the Treasury for determination, as this is a matter which would naturally come before him, and as to which, the opinion of the Attorney General would only be advisory.

DEPARTMENT OF JUSTICE,
November 24, 1914.

SIR: Replying to your communication of November 19, wherein you request an opinion with respect to eligibility of Mr. John H. Bloom for recess appointment as post-

master at Devils Lake, N. Dak. Having investigated the subject and considered the findings of the Solicitor for the Post Office Department, I am of the opinion that this vacancy in a postmastership having occurred during the session of the Senate, by reason of the failure of the Senate to confirm an appointment, the President may now appoint the nominee or any other person to fill the vacancy, by temporary commission, to expire at the end of the next session of the Senate.

This conclusion is founded on the following uniform and unbroken line of authority furnished by the opinions of my predecessors:

Mr. Wirt, 1 Opinions 631.

Mr. Taney, 2 Opinions 525.

Mr. Legare, 3 Opinions 673.

Mr. Mason, 4 Opinions 523.

Mr. Cushing, 7 Opinions, 186.

Mr. Bates, 10 Opinions 356.

Mr. Stanberry, 12 Opinions 32.

Mr. Evarts, 12 Opinions 455.

Mr. Williams, 14 Opinions 562.

Mr. Devens, 16 Opinions 522.

Mr. Hoyt (acting), 26 Opinions 234.

As several of the opinions to which I have just referred discuss the entire subject with marked thoroughness, I have concluded to simply state the conclusion at which my predecessors arrived. These opinions announce as a doctrine of administrative law, that the expression in the Constitution "all vacancies that may happen during the recess" signifies "all vacancies that may *happen to exist during* the recess." Furthermore, these opinions concur in the general conclusion that howsoever a vacancy happens to exist, it may be filled by temporary appointment of the President, and they agree that it is the true spirit and meaning of the Constitution to have all the offices which Congress indicates to be needful for the ends of Government by creating them filled, provisionally rather than that they remain vacant or that a special call of the Senate be required for the purpose of confirmation.

All admit that whenever there is a vacancy existing during the session, whether it first occurred in recess or after

the session began, the power to fill requires the concurrent action of the President and the Senate. It seems a necessary corollary to this, that where the vacancy exists in the recess, whether it first occurred in the recess or during the preceding session, the power to fill rests in the President alone. If, during the recess, the power is not in the President, then it is nowhere, and there would be a time when for a season the President is required by the Constitution to see that the laws are executed and yet denied the opportunity to avail of the only means provided for their execution.

The question as to whether the appointee can be paid the salary of the office before confirmation by the Senate should be referred to the Comptroller of the Treasury for determination, as it is a matter which would naturally come before him and as to which my opinion would only in any event be advisory.

Yours, respectfully,

T. W. GREGORY.

TO THE POSTMASTER GENERAL.

EXECUTIVE ORDER—NEUTRALITY—ATTORNEY GENERAL'S
OPINION.

The Attorney General declines to express an opinion upon the inquiry as to what courses may be followed by the Government to prevent American or foreign vessels from furnishing coal and supplies to belligerent warships at sea, in accordance with the provisions of The Hague Convention No. 13 of 1907, since the inquiry does not present an actually existing case arising in the administration of an executive department and apparently calls for an opinion in advance as to what this department would hold in the future under indefinite and varying facts.

DEPARTMENT OF JUSTICE,

December 4, 1914.

SIR: I have received your letter of November 30, inclosing copy of the two opinions of the Joint State and Navy Neutrality Board and a suggested draft of an Executive order.

You request my opinion on the following questions:

1. What courses may be followed by the Government to prevent an American or foreign vessel from supplying

coal to belligerent warships at sea more than once within the period of three months provided by The Hague Convention No. 13 of 1907?

2. What courses may the Government follow to prevent American or foreign vessels from carrying supplies to belligerent warships at sea in a manner amounting to an infraction of The Hague Convention No. 13 of 1907, relative to the use of neutral ports and waters as a base of naval operations?

3. May the courses to be pursued by the Government include refusal of clearance, a bond not to deliver to war vessels at sea, the requiring an American vessel to give up its charter, or the taking up of the registry of an American vessel?

I regret to say that I find it impossible to answer these questions for the following reasons:

1. They do not seem to "present any actually existing case arising in the administration of your department," nor do they seem to relate to any matters calling for action and decision on your part, and "they apparently call for an opinion in advance as to what this department would hold in the future upon indefinite and varying facts."

It has been the well-considered and established practice of the Attorney General to refrain from giving an opinion under such circumstances. (See instances cited in 19 Op. 414 (1889).)

2. Even if the questions so arose in the administration of your department, they present so many phases, and so many possible diverse states of fact, that a full answer would require a substantial treatise on the law of neutrality.

The particular and varying circumstances under which supplies of coal, etc., may be made, in my opinion, will determine the question whether or not there is any obligation on this Government, under existing international law, to prevent such supplies being made. In other words, a definition of "base of naval operations" must take into consideration "special circumstance of time, of persons, or of place," as well the nature and status of the particular vessel carrying the supplies, the character of the

contract of sale, the frequency of the operation, and various other elements.

Informally, I may say that the draft of an Executive order submitted by you as framed by the Joint State and Navy Neutrality Board would require very careful consideration by me in case my opinion should be asked by the President. As no neutral nation is called upon to interfere with the commercial activities of its citizens further than may be required by the doctrines and precedents of international law, the construction given in this draft Executive order to article 20 of The Hague Convention No. XIII raises a grave question. The exercise of the power to withhold clearance papers also raises serious questions of law.

I express no opinion at the present time on either of these points.

Respectfully,

T. W. GREGORY.

To the SECRETARY OF STATE.

CENTRAL BRANCH OF THE UNION PACIFIC RAILROAD.

The present owner of the Central Branch of the Union Pacific Railroad Co. is not bound to pay the principal or interest on the Government bonds issued to the original company in aid of the construction of its road.

The Government has no present right to claim either the 5 per cent of the net earnings from the railroad company or to withhold the other *half* of the compensation for services rendered it.

DEPARTMENT OF JUSTICE,

December 7, 1914.

SIR: I have the honor to acknowledge receipt of your letter of July 15, 1914, requesting that I reconsider an opinion of my predecessor rendered to the President on January 27, 1913 (30 Op. 35), as the status of the Government's \$1,600,000 subsidy bond claim against the Central Branch of the Union Pacific Railroad Co., on the ground that it is opposed to an opinion of the Solicitor of the

Treasury, given you in his letters of July 27, 1911, and March 29, 1913, respectively. Each opinion may be found in House Document No. 1122, second session Sixty-third Congress. The material facts and statutes are as follows:

Pursuant to the act of July 1, 1862 (12 Stat. 489), as amended July 2, 1864 (13 Stat. 356), 30-year 6 per cent semiannual interest-bearing Government bonds, in five installments of \$320,000 each, were issued and delivered to the said Central Branch on July 27, 1866, December 7, 1866, May 2, 1867, December 4, 1867, and January 21, 1868, respectively, at the completion of each 20-mile section, for the purpose of aiding the construction of 100 miles of railroad from Atchison to Waterville, Kans.

It was a condition of the grant that the company should "pay said bonds at maturity." (*Act of July 1, 1862, sec. 6.*) This provision did not oblige it to pay the interest as it matured; but rather to pay the sum total of interest and principal when the bonds matured. (*United States v. Union Pacific R. R. Co.*, 91 U. S. 72.) To secure the Government, it was provided that the issue and "delivery to the company of said bonds" should "ipso facto constitute a first mortgage" on the railroad and all other property of the company. (*Act of July 1, 1862, sec. 5.*) As further security, it was provided that—

"All compensation for services rendered for the Government shall be applied to the payment of said bonds and interest until the whole amount is fully paid;"—
and that

"After said road is completed, until said bonds and interest are paid, at least 5 per cent of the net earnings of said road shall also be annually applied to the payment thereof." (*Act of July 1, 1862, sec. 6.* The road was completed Nov. 6, 1869.)

The act of July 2, 1864, changed the conditions of the grant favorably for the company. Section 10 authorized the company to issue *its* first mortgage bonds of like amount, date of issue and maturity, and rate of interest; and further provided that the lien of the Government bonds should be subordinate to that of *its own* bonds;

while section 5 provided for the retention of but one-half instead of "all compensation for services."

The effect of the act of 1864 was to subordinate the entire security of the Government, and in consequence the 5 per cent of earnings could not be deducted until after payment of interest on the company bonds. (*Union Pacific R. R. Co. v. United States*, 99 U. S. 402.)

On May 1, 1865, the company, under authority of the act of 1864 and the act of March 3, 1865 (13 Stat. 504), issued the \$1,600,000 of bonds, secured by a first mortgage upon the railroad and all other property of the company.

The act of March 3, 1873 (17 Stat. 508), now sections 5260 and 5261, Revised Statutes, directs the Secretary of the Treasury—

"to withhold all payments of any railroad company and its assigns, on account of freights or transportation over their respective roads of any kind, to the amount of the payments made by the United States for interest upon bonds of the United States issued to any such company, and which shall not have been reimbursed, together with the 5 per centum of net earnings due and unapplied, as provided by law."

On July 27, 1896, December 7, 1896, May 2, 1897, December 4, 1897, and January 21, 1898, respectively, the company defaulted in the payment of principal and interest due on the five installments of Government bonds, with the result that after crediting all applied earnings there remains now due the Government over \$4,000,000.

At various times after November 1, 1872, the company defaulted in the payment of interest on *its own* first mortgage bonds, and on May 1, 1895, it defaulted in the payment of the whole principal.

In November, 1895, the trustee, on application of the Government as the holder of about \$1,100,000 of these latter bonds, instituted suit to foreclose the first mortgage. Though named as a defendant, the Government was not served with process. In February, 1898, a decree was entered ordering sale of the entire property in one parcel and subject to any liabilities *prior* in lien to the mortgage

thereby foreclosed. At the sale, held May 23, 1898, Simon Borg and Gilman Clapp purchased the entire property, including franchises, for \$2,350,000. On June 27, 1898, a decree was entered confirming the sale to Borg and Clapp, and providing—

“that upon the transfer and conveyance by said Borg and Clapp of the property to be transferred and conveyed to them by said special master, to the new corporation to be formed by said purchasers to acquire the same, all obligations incurred by said purchasers on account of the purchase of said railroad, franchises, and other property, shall be transferred to and assumed by such new corporation, and shall constitute a first lien upon the property so transferred; and thereupon said purchasers shall individually be discharged from all obligations and liability therefor.”

Later the property was conveyed to Borg and Clapp—“free and discharged from the lien and encumbrance of the said mortgage in the decree mentioned, and from the claims of the other parties to this suit and those claiming under them, saving only as in said decree, and as in said order of confirmation expressly reserved.”

On July 7, 1898, Borg and Clapp conveyed to a new company, Central Branch, Union Pacific Railway Co. At about the same time the Missouri Pacific Railway Co., which had operated the railroad in question under lease since December 31, 1885, acquired the entire capital stock of the new corporation, which eventually was merged into the Missouri Pacific.

The Attorney General, the Solicitor of the Treasury, and the Comptroller of the Treasury have agreed that the Government may continue to withhold one-half of the compensation for services rendered it, and is entitled to redeem the property *upon the usual conditions*.

The questions in dispute are:

1. Whether the obligation of the original company to pay at maturity the Government bonds and interest now rests on the present owner.

2. Whether the Government is entitled to apply toward the payment of its claim 5 per cent of the net earnings from the railroad.

3. Whether it may hold the *other* half also of the compensation for services rendered it.

I.

I am of the opinion that the present owner is not bound to pay the Government bonds or interest thereon. My reasons are:

First. Section 15 of the act of 1862 reads:

"Wherever the word 'company' is used in this act, it shall be construed to embrace the words 'their associates, successors and assigns,' etc."

This section can not be read to impose this obligation on the present owner. Whilst under a proper application of section 15, the original company undertook, on behalf of itself and its successors and assigns, to pay the Government bonds at maturity, it could not bind its successors or assigns to assume, against their will, a personal liability for their payment. Conceding for argument's sake only, that the effect of the words "successors and assigns" was to make the obligation a lien on the property into whose-soever hands it passed—as distinguished from a *personal* obligation—such lien was subordinate to the lien of the company's own first mortgage.

In *Hoard v. C. & O. Ry. Co.*, 123 U. S. 222, 226, wherein was involved an undertaking of the Chesapeake & Ohio Railway Co., on behalf of itself and "its successors and assigns," it was held that such obligation could not be enforced against the Chesapeake & Ohio Railway Co., which had acquired the properties of the railroad company under foreclosure. The court said:

"The present defendant, the *railway* company, is not shown to be under any obligation to perform the covenant of its predecessor, the *railroad* company, which is set up here as a matter of specific performance. The persons who purchased the railroad at the mortgage foreclosure

sale did not thereby * * * become obligated to pay the debts and perform the obligations of the *railroad* company. (*Railroad Co. v. Miller*, 114 U. S. 176.) They bought the property of that company and its franchises; but if, as such purchasers, they thereby became bound to pay all the debts and perform all the obligations of the corporation whose property they bought, it would put an end to purchases of railroads."

(See also *Tompkins v. L. R. & F. S. Ry.*, 125 U. S. 109, 118; *Wiggins Ferry Co. v. O. & M. Ry.*, 142 U. S. 396, 407-8; Jones, *Corporation Bonds & Mortgages*, sec. 674.)

Second. If the purchasers at foreclosure sale must assume the obligation of the original owner to pay the Government bonds, the effect would be to put that obligation ahead of the first mortgage bonds, and to make a foreclosure of the first mortgage an idle act. Or as was said in *Union Pacific Railroad Co. v. United States*, 99 U. S. 424:

"This would be to grant a priority, and, in the same breath, to take it back again."

Third. Section 6 of the act of 1862 gave the Government four separate rights. Section 10 of the act of 1864 expressly subordinated the lien of the Government—

"except as to the provisions of the sixth section of the act of which this act is an amendment, *relating to the transmission of dispatches and the transportation of mails*, etc., for the Government."

This exception saved only the Government's prior right of transmission and transportation. All other rights of the Government, because not saved by the exception, were subordinated.

II and III.

I am also of the opinion that the Government has no present right to claim either the 5 per cent of the net earnings from the railroad company or to withhold the other *half* of the compensation for services rendered it. My reasons for these conclusions are:

First. The *third* reason assigned under subdivision I, above, applies here also.

Second. Conceding for argument's sake that these one-time rights of the Government were charged on the property, even in the hands of successive grantees, nevertheless such charges were subordinate in rank to the lien of the company's first mortgage. After foreclosure of that mortgage, all that remained of these charges was a right to redeem the property upon conditions. These subordinate rights, save only the right to redeem, ceased when, after confirmation of the sale, the purchaser was let into possession. (*Chicago, etc., R. R. v. Fosdick*, 106 U. S. 47, 69.) While it is true that as to a junior mortgagee not made party the case stands as if there had been no foreclosure (*Collins v. Riggs*, 14 Wall. 491), it is also true that when the senior mortgagee has come lawfully into possession, even though without foreclosure, the right of the mortgagor and those claiming under him to take income is terminated.

Third. The act of March 3, 1873 (secs. 5260 and 5261. Revised Statutes), in no manner changes the rights of the parties. It merely provides for a suspension of payment and refers the parties to the Court of Claims for adjudication of their rights, *as they then existed*. To determine those rights the court must resort to the statute first referred to.

Fourth. Though the Government were to wholly abandon its right to redemption, it could surcharge the property with a duty to pay the 5 per cent of income until its lienless debt was fully paid. Of this, in *Union Pacific Railroad Co. v. United States* (99 U. S. 425), the court said:

"Or else the whole Government debt might be paid to the exclusion of the first mortgage, which is admitted to have the priority. *Such a result would be manifestly absurd.*"

Respectfully,

T. W. GREGORY.

To the SECRETARY OF THE TREASURY.

IMPORTATION OF CATTLE FROM COLOMBIA.

Colombia is not entitled, under the treaty of 1846 between the United States and New Granada, to have healthy cattle imported from her territory into the United States until the Secretary of the Treasury has officially determined, and given public notice thereof, that such importation will not tend to the introduction or spread of contagious or infectious diseases among cattle of the United States.

Colombia is entitled to have tick-infested cattle imported into that part of Texas below the southern cattle quarantine line upon complying with all the regulations and fulfilling all the conditions imposed upon the importation of tick-infested cattle from Mexico.

DEPARTMENT OF JUSTICE,

January 12, 1915.

SIR: I have the honor to acknowledge the receipt of your letter of December 22, in which you ask my opinion as to whether, under the treaty of 1846 between the United States and New Granada, "Colombia is entitled to have healthy cattle imported from her territory into the United States, provided such importation will not tend to the introduction or spread of contagious or infectious diseases among the cattle of the United States," and "whether she is entitled to have cattle imported into that part of Texas below the southern cattle quarantine line even when tick infested."

The treaty with New Granada, now Colombia (9 Stat. 881), provides:

"The United States of America and the Republic of New Granada, desiring to live in peace and harmony with all the nations of the earth, by means of a policy frank and equally friendly with all, engage mutually not to grant any particular favor to other nations, in respect of commerce and navigation, which shall not immediately become common to the other party, who shall enjoy the same freely, if the concession was freely made, or on allowing the same compensation, if the concession was conditional."

This is a "most-favored-nation clause," and where any particular favor in respect to commerce or navigation is granted by either of the parties to the treaty to another

country, the concession will become common to the other party upon like consideration; that is, if the concession were freely made it is to be enjoyed freely, or, if the concession were conditional, on allowing the same compensation or fulfilling the same conditions under which the concessions had been allowed to the grantee. (*Bartram v. Robertson*, 122 U. S. 116, 120.)

The acts of Congress regulating the importation of cattle from foreign countries into the United States are as follows: Act of August 30, 1890, c. 839, 26 Stat. 414; act of October 1, 1890, c. 1244, 26 Stat. 567, 616, section 20, the provisions of which have been reenacted in subsequent tariff acts and now appear as subsection 1, paragraph H, section 4, of the tariff act of October 3, 1913, c. 16, 38 Stat. 114 and 195; the act of April 23, 1897, c. 1, 30 Stat. 1, 7; the act of February 2, 1903, c. 349, 32 Stat. 791; and the act of March 4, 1911, c. 238, 36 Stat. 1235, 1240.

The pertinent provisions of the existing law are as follows:

"the importation of neat cattle, sheep, and other ruminants, and swine, which are diseased or infected with any disease, or which shall have been exposed to such infection within sixty days next before their exportation, is hereby prohibited." (26 Stat. 414, 416.)

"That the importation of neat cattle and the hides of neat cattle from any foreign country into the United States is prohibited: *Provided*, That the operation of this section shall be suspended as to any foreign country or countries, or any parts of such country or countries, whenever the Secretary of the Treasury shall officially determine, and give public notice thereof that such importation will not tend to the introduction or spread of contagious or infectious diseases among the cattle of the United States; and the Secretary of the Treasury is hereby authorized and empowered, and it shall be his duty, to make all necessary orders and regulations to carry this section into effect, or to suspend the same as therein provided, and to send copies thereof to the proper officers in the United States and to such officers or agents of the United States in foreign

countries as he shall judge necessary." (26 Stat. 567, 616; reenacted Oct. 3, 1913, c. 16, 38 Stat. 114, 195.)

The Secretary of Agriculture is authorized—
"within his discretion, and under such joint regulations as may be prescribed by the Secretary of Agriculture and the Secretary of the Treasury, to permit the admission of tick-infested cattle from Mexico into that part of Texas below the southern cattle quarantine line." (36 Stat. 1240.)

It will be observed that by the act of August 30, 1890, the importation of neat cattle infected with any disease or exposed to some infection within 60 days before their exportation is prohibited. By the act of October 1, 1890, the importation of all neat cattle, whether sound or diseased, is prohibited unless the operation of the statute is suspended, as therein provided, by the Secretary of the Treasury.

The Secretary of the Treasury is not empowered by the later statute to admit, at his discretion, foreign cattle into this country, but is designated as the proper officer of the Government to determine as a question of fact whether the importation of such cattle as are not excluded by the act of August 30, 1890, will "tend to the introduction or spread of contagious or infectious diseases among the cattle of the United States."

After this question has been "officially determined" his duties are mandatory. He must "make all necessary orders and regulations to carry" the law into effect; that is, to exclude cattle found by him to be dangerous, or to provide, in conjunction with the Secretary of Agriculture (32 Stat. 792), reasonable regulations for their admission, if he finds that their importation would not tend to introduce or spread diseases among the cattle of the United States. Under the existing law, with the exception of Mexico, hereinafter referred to, all countries are placed upon an exact equality. If the Secretary of the Treasury finds that the importation of cattle from any foreign country would be attended by the dangers mentioned, they can not be lawfully admitted into the United States.

If, on the other hand, they are not diseased and have not been exposed to infection within 60 days before exportation and he finds that their importation would not tend to the introduction or spread of contagious or infectious diseases, he could not legally exclude them, but must "make all necessary orders and regulations" for their importation.

As far as these statutes, with the exception of the act of 1911, are concerned, no question of rights under a "most favored nation clause" of a treaty can arise, there being no "most favored nation." For all alike it is a condition precedent to the admission of cattle into the United States that the Secretary of the Treasury shall "officially determine, and give public notice thereof, that such importation will not tend to the introduction or spread of contagious or infectious diseases among the cattle of the United States." His failure to make a true finding of fact, a possibility equally present to all nations, would be only a mistake of an administrative officer, which should be corrected in the usual manner by application to such officer or to Congress, or otherwise.

I therefore answer your first question by saying that Colombia is not entitled under the treaty of 1846 to have healthy cattle imported from her territory into the United States until the Secretary of the Treasury has officially determined, and given public notice thereof, that such importation will not tend to the introduction or spread of contagious or infectious diseases among cattle of the United States.

A different question arises under the act of March 4, 1911, authorizing under certain conditions the admission of tick-infested cattle from Mexico. This act grants to Mexico a particular favor in respect to commerce, which is not made common to all other nations. Under the "most favored nation clause" of the treaty with Colombia, the concession becomes common to her, and tick-infested cattle from that country should be admitted into that part of Texas below the southern cattle quarantine line upon fulfillment by Colombia of the same conditions under which the concessions are allowed to Mexico.

I answer your second question, therefore, by saying that Colombia is entitled to have tick-infested cattle imported into that part of Texas below the southern cattle quarantine line upon complying with all the regulations and fulfilling all the conditions imposed upon the importation of tick-infested cattle from Mexico.

Respectfully,

T. W. GREGORY.

To the SECRETARY OF STATE.

COMMISSIONER OF INTERNAL REVENUE—COMPROMISE OF
TAX CASE BEFORE DISTRAINT.

The Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, has authority under section 3229, Revised Statutes, to compromise a case involving a tax liability before proceeding to distraint and sale.

DEPARTMENT OF JUSTICE,

January 30, 1915.

SIR: In your letter of the 24th ultimo you requested my opinion, whether under section 3229 Revised Statutes, the Commissioner of Internal Revenue, with your approval, has authority to compromise a case involving a tax liability before proceeding to distraint and sale.

In my judgement he has. Section 3229 Revised Statutes provides:

“SEC. 3229. The Commissioner of Internal Revenue, with the advice and consent of the Secretary of the Treasury, may compromise any civil or criminal case arising under the internal-revenue laws instead of commencing suit thereon; and, with the advice and consent of the said Secretary and the recommendation of the Attorney General, he may compromise any such case after a suit thereon has been commenced. Whenever a compromise is made in any case there shall be placed on file in the office of the Commissioner the opinion of the Solicitor of Internal Revenue, or of the officer acting as such, with his reasons therefor, with a statement of the amount of tax assessed, the amount of additional tax or penalty imposed by law in consequence of the neglect or delinquency of the person

against whom the tax is assessed, and the amount actually paid in accordance with the terms of the compromise."

Here is general authority given to compromise "any civil or criminal case arising under the internal-revenue laws," and I see no reason for inserting limitations which Congress has not seen fit to make.

In the memorandum of the Solicitor of Internal Revenue inclosed with your letter it is suggested that the words in section 3229 "instead of commencing suit thereon" limit the application of the statute to those cases involving court proceedings and therefore exclude cases of distraint. In my judgment, however, these words merely mark the boundary line between those cases where compromise may be made by the Commissioner of Internal Revenue and the Secretary of the Treasury, and those cases where the concurrence of the Attorney General is necessary. While the remedy by way of distraint for the collection of taxes is a lawful and indeed essential one, it is nevertheless harsh in its operation, and it can not be supposed Congress intended to permit compromises of actions inter partes but not of those ex parte. Suppose that after the tax is assessed and sent to the collector, but before distraint, the commissioner learns of a decision of the Supreme Court to the effect that the tax so levied is illegal. Must he still proceed to distrain, although the amount realized would at once have to be refunded under section 3220? Such a conclusion does not commend itself.

The solicitor of internal revenue also suggests that Congress can not delegate the power to remit a tax. But while the power to levy a tax is legislative, the power to assess it is quasi judicial and administrative. (*Field v. Clark*, 143 U. S. 649, 693, 694; *Coopersville Cooperative Creamery Co. v. Lemon*, 163 Fed. 145, 147.) The Commissioner of Internal Revenue under authority of law assesses internal-revenue taxes, determining the persons upon whom the levy falls and the extent thereof. No reason is perceived why Congress has not the power to confer upon him authority to revise an assessment, which he himself makes, and to withdraw it, if he believe it without warrant of law. Equally Congress must have power to

delegate to him authority to withdraw the assessment on terms—that is, to compromise it—if he think the tax illegal, or the particular individual not liable for it, or not to the whole extent, or that the full amount of the tax can not be collected. The power conferred on the commissioner by section 3220, Revised Statutes, to pay back taxes erroneously or illegally assessed or collected has been exercised for years without question, and has been sustained by the Supreme Court. (*U. S. v. Savings Bank*, 104 U. S. 728.) If Congress can give the commisioner authority to pay back taxes which have gone into the Treasury, it can of course give him authority to remit the taxes at an earlier stage. The remarks of Justice Harlan in *United States v. Roelle* (Fed. Cas. 16186) are dicta, as is shown by the opinion on error (*Whiskey cases*, 99 U. S. 594, 596, 597), where it appears that the Commissioner of Internal Revenue had never acted on the case. The *Dorsheimer case* (7 Wall. 166) dealt with a statute authorizing the remission of fines, forfeitures, and penalties only, and the remarks of the court must be construed in view of that fact. I entertain no doubt that Congress can delegate to the Commissioner of Internal Revenue the power to compromise a tax after it is assessed, but before payment, and before distraint is levied or suit brought upon it.

It is equally clear that section 3229, Revised Statutes, does this. Its language is amply large to cover this grant, and the express requirement in the statute of a statement showing the assessed tax with additions and penalties would be meaningless, if the power to compromise did not include the tax itself.

Your letter refers to certain opinions of my predecessors which are said to indicate a divergence of view on the subject here dealt with. The question discussed in those opinions was whether either section 3229, Revised Statutes, or section 3469, Revised Statutes, gave the power to remit an admittedly lawful tax on a perfectly solvent person on account of the hardship of the case. No such question is submitted to me in your letter which confines itself, as I confine myself, to the mere question of power to com-

promise a tax case involving a distraint. Nor does the case of the Denver Dairy Co. referred to in your letter raise such a question. In that case there was a fair doubt as to the validity of the assessment (*United States v. 11,150 Pounds of Butter*, 195 Fed. 657), and the revenue officer reported that probably no more than the offer could be realized by distraint. The question of the power of the Commissioner of Internal Revenue to remit an admittedly valid tax on a solvent taxpayer for reasons of mere hardship is one, therefore, which I have not considered, and on which I express no opinion.

I have the honor to be, your obedient servant,

T. W. GREGORY.

To the SECRETARY OF THE TREASURY.

PURCHASE OF LINE OF RAILROADS IN ALASKA.

The President is authorized, under the act of March 12, 1914 (38 Stat. 305), to obligate the United States to expend, for the purchase of a line of railroads in Alaska necessary to complete the line designated by him, a sum in excess of the existing appropriation by Congress, but within the maximum of the cost as prescribed by the act.

DEPARTMENT OF JUSTICE,

March 24, 1915.

SIR: In your letter of the 5th instant you refer to the act of March 12, 1914, entitled "An act to authorize the President of the United States to locate, construct, and operate railways in the Territory of Alaska" (38 Stat. 305, ch. 37), the execution of which has in certain respects been confided to your department by Executive order, and ask whether the President "is authorized to obligate the United States to expend, for the purchase of a line of railroads in Alaska necessary to complete the line designated by him, a sum in excess of the existing appropriation by Congress, but within the maximum of the cost as prescribed by the act."

The act expressly empowers and directs the President to lay out, construct, and operate the railroad or railroads

in contemplation. There is a provision that he may "purchase, condemn, or otherwise acquire, upon such terms as he may deem proper, any other line or lines of railroad in Alaska which may be necessary to complete the construction of the line or lines of railroad designated or located by him"; and another that he may "make such other contracts as may be necessary to carry out any of the purposes of this act"; and there is also this sweeping grant of power, viz:

"That it is the intent and purpose of Congress through this act to authorize and empower the President of the United States, and he is hereby fully authorized and empowered, through such officers, agents, or agencies as he may appoint or employ, to do all necessary acts and things in addition to those specially authorized in this act to enable him to accomplish the purposes and objects of this act."

Thus it appears that the making of such a contract as that which you describe is authorized, not by implication merely but in express terms.

Section 2 provides:

"That the cost of the work authorized by this act shall not exceed \$35,000,000, and in executing the authority granted by this act the President shall not expend nor obligate the United States to expend more than the said sum; and there is hereby appropriated, out of any money in the Treasury not otherwise appropriated, the sum of \$1,000,000 to be used for carrying out the provisions of this act, to continue available until expended."

While the limitation upon the total expense must, of course, be carefully respected in the making of all contracts, as well as in all actual disbursements of the moneys within that amount which Congress may from time to time appropriate, it is clear that the power to contract presently for the payment of money in the future is not confined to the amount of the existing appropriation. The contract would stand good until satisfied even though the appropriation became exhausted. In that event, however, the obligation of the Government could not be discharged until more money had been appropriated by Congress.

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See:

Revised Statutes, section 3679, as amended February 27, 1906 (34 Stat. 48); Revised Statutes, sections 3732, 3733, 5503; act of June 30, 1906, section 9 (34 Stat. 764); 30 Op. 147; 28 Op. 466; 15 Op. 124, 209, 236; 19 Op. 650; 21 Op. 1, 244, 288, 490; 27 Op. 432; 12 Comp. Dec. 324; *Shipman v. United States*, 18 Ct. Cl. 146.

Your question is answered in the affirmative.

Respectfully,

T. W. GREGORY.

To the SECRETARY OF THE INTERIOR.

WHEN SECTION 14 OF THE SEAMEN'S ACT TAKES EFFECT.

Section 14 of the seamen's act of March 4, 1915 (38 Stat. 1170), relating to life-saving regulations, becomes effective on November 4, 1915, as to United States vessels and on March 4, 1916, as to all other vessels.

DEPARTMENT OF JUSTICE,

March 31, 1915.

SIR: I have the honor to acknowledge receipt of your letter of March 19, 1915, wherein you request my opinion as to whether section 14 of the so-called seamen's bill (Senate 136) approved March 4, 1915, will take effect on July 1, 1915, or on November 4, 1915, and March 4, 1916, respectively, as to domestic and foreign vessels.

The material portions of the two sections of this act that must be considered in answering your inquiry read:

"SEC. 14. That section forty-four hundred and eighty-eight of the Revised Statutes is hereby amended by adding thereto the following:

"The powers bestowed by this section * * * in respect of life boats * * * etc. * * * on *steamers navigating* the ocean, or any lake, bay, or sound of the United States, *on and after July first, nineteen hundred and fifteen*, shall be subject to the provisions, limitations, and minimum requirements of the regulations herein set forth, and *all such vessels shall thereafter* be required to comply in all respects therewith: *Provided*, That foreign vessels leaving ports of the United States shall comply

with the rules herein prescribed as to life-saving appliances, * * *," etc.

"Sec. 18. *That this act shall take effect*, as to all vessels of the United States, eight months after its passage, and as to foreign vessels twelve months after its passage, * * *," etc.

The legislative history of the act is as follows:

H. R. 23673, known as the Wilson bill, failed to become a law in the Sixty-second Congress. It was reintroduced in the Sixty-third Congress as "Senate 136" and known as the La Follette bill. With minor changes it passed the Senate October 23, 1913; was transmitted to the House and referred to the Committee on Merchant Marine and Fisheries. (A second bill—Senate 4—also introduced by Mr. La Follette, on October 21, 1913, need not be further noticed.) Meantime, on May 3, 1913, H. R. 4616, having the identical title of the present act, was introduced in the House and known as the "Alexander bill."

None of these three bills had any provision resembling section 14, *supra*, because the life-boat provisions of that section were taken from the International Convention on the Safety of Life at Sea, which was not agreed to at London until *January 20, 1914*. Each of these three bills alike provided that it should *take effect ninety days* after its passage as to United States vessels, and *twelve months* after its passage as to foreign vessels.

On *June 19, 1914*, the House Committee on Merchant Marine and Fisheries, by its majority report (No. 852, 63d Cong., 2d sess.), recommended a substitute for all after the enacting clause of Senate 136; declared that the Alexander bill was used as a basis of the proposed substitute, and, speaking of section 14, said (p. 26):

"The lifeboat provisions * * * are substantially those contained in the Convention on Safety of Life at Sea, adopted at London January 20, 1914."

That convention provided for legislation by the respective countries interested in order to give effect thereto. (Arts. 1 and 65.) It further provided (art. 65) "This convention shall come into force on the 1st July, 1915." Ratification of the convention by the countries represented

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was essential. (Arts. 3 and 69.) The United States has not yet ratified it.

The introductory paragraph of section 14 of the committee substitute was in form as finally enacted, save that the last proviso as to foreign vessels was added later. Section 18 of the committee substitute changed the *ninety-day* period in section 17 of the Alexander bill (affecting United States vessels) to *six months*. (This was undoubtedly done to meet the recommendation to that effect of the Secretary of Commerce in a communication to Senator Clark. Congr. R., 63d Cong., 1st sess. p. 5693.) The substitute was adopted; and, thus altered, Senate 136 passed the House. Later, in conference, the *six months* period was changed to *eight months*, and in this form, with minor changes not here important, the bill became a law.

In my judgment, *no part of this act* becomes effective legislation until November 4, 1915, as to United States vessels, and March 4, 1916, as to all others. I base this conclusion on these considerations.

I.

When the three original measures (the Wilson, La Follette, and Alexander bills) were originally introduced, the ninety-day provision and the year provision necessarily controlled the taking effect of the *whole act*. This was also true of these provisions when each—the Wilson and La Follette bills—passed the body in which it was originally introduced. Save that “ninety days” was replaced by “six months,” the language used in section 18 of the substitute for Senate 136 was identical in all respects here material, with the language in section 17 of the Alexander bill. I see no reason for giving that language in the bill as finally passed any narrower operation than must be attributed to it in the earlier stages of that bill, or any of the three precedent bills.

Had Senate 136 been passed on *June 19, 1914*, when section 14 first appeared therein, the six months period then named in section 18 would have expired December 19, 1914—over a half year prior to the arbitrary date fixed in

section 14 (to conform to the date named in the London convention). There was at that time no thought in the legislative mind of any conflict between the two periods; and there was no conflict, in fact, even though section 18 were applied, as it should be, to the whole act. The present apparent conflict is due solely to lapse of time in the legislative consideration of the bill.

Of a situation quite similar to this the Supreme Court, in *United States v. Burr*, 159 U. S. 78, 86, said:

"The bill was reported to the Senate by the Finance Committee (to which it had been referred) on March 20, 1894, and 'the thirtieth day of June' was substituted in sections one and two for the first day of June. The bill, as amended in the Senate, passed that body July 3, 1894, and sections one and two were amended by substituting the first day of August for the thirtieth day of June. The conference committee of the House agreed to the bill as passed by the Senate without any further amendment on August 13, and it was sent to the President on August 15. It thus appears that at every stage of its progress the intention of Congress was that the tariff provisions of the bill should operate prospectively and that as by the concurrence of the House in the Senate amendments the bill did not go back to the Senate, the first day of August remained in the bill as originally fixed in the Senate, July 3, 1894.

"Both Houses intended that the duties imposed by section one, and the additions made to the free list in section two, should not take effect except at a point of time after the passage of the act. And the Senate endeavored to effectuate that intention by its action on the third of July, but, because of the differences between the two bodies, *the passage of the act was delayed*, which delay was terminated by the House finally accepting the changes made by the Senate, so that no new date in the future was specifically assigned for section one to go into effect, although the intention that the act should not operate retrospectively was palpable throughout."

II.

The language itself is that usually employed by legislative bodies to postpone generally the taking effect of an enactment in its entirety, and the section (18) is located at the appropriate and usual place in the act for such purpose.

III.

While recognizing the rule that a special provision controls a general provision on the same subject, I understand this to be a mere rule of construction having to do with the application of one of two inconsistent provisions in the administration of an act that has become an operative law.

In *United States v. Burr, supra*, speaking of a section naming a specific date anterior to the passage of the act, the court said (p. 83):

"The question is not one of *construction* but of intention as to the operative effect of this act because of the existence of the particular date in section 1."

If this be so, the rule should not be applied to bring to life a fragment of a statute in advance of the birth of the whole.

IV.

Section 18, rather than section 14, would seem to be the specific section, so far as the taking effect of the act is concerned. In 29 Op. 505, of a somewhat similar condition in the eight-hour law, Attorney General Wickersham said (p. 511):

"Your third question is whether the provision regarding the employment of labor should be inserted in contracts now to be awarded for supplies for the entire current fiscal year.

"The first section of the act provides that 'every contract hereafter made * * * shall contain' an eight-hour work-day restriction, as well as a penalty stipulation for a violation thereof. Section 3 provides that 'this act shall become effective and be in force on and after January 1, 1913.'

"It appears that section 3 was added in the Senate without debate (48 Cong. Rec., 7418, May 24, 1912), so that this provision must be understood as having been accepted by that body as meaning just what it said."

And speaking of reasons making for the contrary view, further said (p. 512):

"But these inferences are too vague, in my opinion, to justify a disregard of the plain meaning and effect of section 3. That section expressly fixes the time when the act shall become effective and be in force; and, as the only requirement of the act is that contracts thereafter made shall contain the eight-hour restriction and penalty stipulation, when Congress said that the act should become effective and be in force on the later date, it can only be understood to have been meant that until that date the mandate of the act in the respect mentioned should be regarded as innocuous. In other words, in view of the provision of section 3 that 'this act shall become effective and be in force on and after January 1, 1913,' the words 'every contract hereafter made' in section 1 must necessarily mean that every contract made after the act becomes effective shall contain the provisions mentioned. To hold that the mandate of the act as to the insertion in contracts of the eight-hour restriction and penalty stipulation became operative on its passage despite section 3, but that such contractual provisions were not to become operative until January 1, 1913, is to write a new act."

V.

Section 14 is not direct independent legislation. It merely undertakes to *amend* section 4488, Revised Statutes, and it is the section 4488 as amended and redrafted in section 14 that contains this date of July 1, 1915. Until the amendatory act takes effect it does not supplant old section 4488, whatever may be the language embraced in the redraft of that section.

In *United States v. Burr*, *supra*, it is said (pp. 83-86):

"And upon the threshold we are met with the fact that the act of October 1, 1890, was not repealed in terms until

August 28, 1894, * * * (83). How then can it be held that the act of October 1, 1890, was intended to be repealed by retroaction? * * * (84). These considerations lead to the conclusion that the act ought not to be construed to operate retrospectively, contrary to the general rule, and so as to turn what was intended to secure a period of time to enable business men to act understandingly under the new law into a source of confusion and mischief to the contrary (85). And as the act of October 1, 1890, was not repealed by the act of August, 1894, until the latter act became a law * * * we think it can not be doubted that Congress intended that the rates of duty prescribed by the act of 1894 to be levied on the 1st day of August. *if the bill should then be a law*, and if not, then as soon after that date as it should become a law. (86.)”

VI.

If the two provisions were otherwise irreconcilable, the later provision (sec. 18) must prevail, because it is both presumptively and in fact in this instance the one which came last to the attention of the legislature. As the latest legislative thought on the subject it must prevail. In *Powers v. Barney*, 5 Blatch. 202, of a conflict in the tariff act of March 2, 1861, between an earlier section assessing a 10 per cent ad valorem duty on Peruvian bark and a later section exempting it from all duty, the court said:

“In this difficulty of conflicting claims, I know of no other way of solving it, than by applying the well-settled rule of construction, in the case of two repugnant provisions of the same act, which is, that the last provision shall prevail, as speaking the latest and final intent of the lawmakers.”

See also 2 Sutherland on Statutory Construction, sec. 349, p. 668; 26 Am. & Eng. Encyc. Law, 2d ed., 619; *Hall v. Equator Smelting Co.*, 11 Fed. Cas. No. 5931; *In re Richards*, 96 Fed. 935, 939; *United States v. Jackson*, 143 Fed. 783, 787.

Respectfully,

T. W. GREGORY.

TO THE SECRETARY OF COMMERCE.

NATIONAL BANKS—GUARANTY OF DEPOSITS.

A national bank may enter into a contract with a guaranty company under which, in consideration of premiums paid by the bank, the company insures and guarantees each depositor in the bank the full payment of his deposit therein.

DEPARTMENT OF JUSTICE,

March 31, 1915.

SIR: I have the honor to acknowledge the receipt of your letter of February 12, 1915, inclosing letter of the Comptroller of the Currency, opinion of the Acting Solicitor of the Treasury, and brief filed with the Comptroller on behalf of a guaranty company and certain national banks, in which the question is raised as to whether a national bank may enter into a contract with a guaranty company under which, in consideration of premiums paid by the bank, the company "insures and guarantees each depositor in the bank the full payment of his deposit therein." You ask my opinion upon this question.

In my opinion it is within the power of a national bank to enter into such a contract.

The law confers upon national banks such incidental powers as are required to meet all legitimate demands of the banking business and to enable them to conduct their affairs safely and prudently within the scope of their charters. (Sec. 5136, Rev. Stat.; *First National Bank v. National Exchange Bank*, 92 U. S. 122, 127.) The power to give security for deposits seems to be recognized by section 5153, Revised Statutes, as among these incidental powers. The section last mentioned, after providing that all associations created under the act shall, when so designated by the Secretary of the Treasury, be depositories, further provides that "The Secretary of the Treasury shall require the associations thus designated to give satisfactory security, by the deposit of United States bonds and otherwise, for the safe-keeping and prompt payment of the public money deposited with them," etc. It is believed that this section is more reasonably construed as a recognition of the existence of the power on the part of national banks to give security for deposits

than as a grant by implication of authority to give security for Government deposits alone.

The power of banks to give security for deposits or for payment of their debts has been frequently recognized. It has been held that the property of a bank may be pledged as security for a debt (*United States v. Robertson* (1831), 5 Pet. 641, 650); that a bond with sureties may be given to prevent depositors from withdrawing their accounts (*Wylie v. Commercial & Farmers' Bank* (1902), 41 S. E. 504, 509, 63 S. C. 406), and that a national bank may give its bond with sureties to secure a deposit of State funds (*State of Nebraska v. First National Bank of Orleans* (1898); 88 Fed. 947, 951.)

The power to contract for guaranteeing or securing depositors arises from the nature of the relation existing between the banks and their depositors. The relation created between the bank and a depositor by the receipt of deposits is that of debtor and creditor. (*Bank of the Republic v. Millard* (1869); 10 Wall. 152, 155; *Davis v. Elmira Savings Bank* (1896), 161 U. S. 275, 288.) The power to receive deposits, expressly granted to every national bank (sec. 5136 R. S.), is, of course, indispensable to the conduct of the business of banking, and the extent of its exercise is in a degree the measure of the success of the bank. The ability of a bank to obtain deposits largely depends upon the confidence of depositors or the belief that their deposits are secure. Loss of such confidence on the part of depositors is usually attended with loss and inconvenience to them, to the bank, and to the public. The law accordingly imposes upon the bank an imperative duty not only to repay deposits but to keep them secure. For the protection of depositors, its revenues and property are pledged, its stockholders are made subject to a double liability, and its directors may be held liable for a violation of their duties.

The means by which depositors are to be protected and secured are not expressly limited or restricted by statute. A large discretion is left to the officers and directors. They may use such means for the purpose as are not prohibited

by, or inconsistent with the provisions of, the law, and as they may reasonably find to be suitable and proper and not inconsistent with the prudent conduct of the affairs of the bank within the scope of its charter. "Whatever protects the depositor," it has been said, "protects the bank, because it assures confidence in the bank." (*Noble State Bank v. Haskell* (1908), 22 Okla. 48, 89.)

A contract of insurance or guaranty, such as described in the question submitted, may afford protection to depositors by securing the performance of an obligation on the part of the bank which otherwise might not be performed. And it is not unreasonable to believe that such a contract at the same time may prove valuable to the bank because of the confidence it may assure. No reason is perceived for prohibiting a national bank, in the discretion of its directors, from so securing its depositors or for denying to the bank such benefits as they believe may accrue in the form of increased confidence resulting from such a contract.

Opinions of former Attorneys General, dated, respectively, July 28, 1908 (27 Op. 37), and April 6, 1909 (27 Op. 272), are referred to in the inclosures as having been construed by the Comptroller of the Currency as holding that national banks are without authority to pay, as part of their legitimate expenses, premiums on policies insuring their depositors against loss.

As I view these opinions, the conclusion in neither of them is inconsistent with the conclusion reached herein. The opinion of July 28, 1908, construing the Oklahoma State banking act, determined that a national bank could not lawfully participate in the plan contemplated by the act for guaranty of deposits, because it involved essentially a guaranty to the depositors of other banks that they should be paid in full—a contract which was deemed beyond the powers of the bank to make. The opinion of April 6, 1909, held that national banks in the State of Kansas could not avail themselves of the bank depositor's guaranty law of that State. The inquiry, upon the answer to which the decision rests, was whether an acceptance of the provisions

of the Kansas law "would so control the conduct of the affairs of national banks as to expressly conflict with the laws of the United States."

As pointed out in the opinion of the Solicitor of the Treasury, the more recent opinion of May 7, 1909 (27 Op. 324), in which the form of a policy of insurance guaranteeing the assets of a national bank against loss was approved, provided certain suggested modifications should be made, is more nearly in point on the question now under consideration and is in harmony with the views herein expressed.

The language employed in the opinions of July 28, 1908, and April 6, 1909, to the effect that national banks are without power to contract for insuring that depositors shall be paid in full was used in the course of argument merely, applied to a question which it was not necessary to determine, and may be disregarded so far as inconsistent with this opinion.

Respectfully,

T. W. GREGORY.

TO THE SECRETARY OF THE TREASURY.

CANAL ZONE—AMENDMENT OF PENAL CODE AND CODE OF CRIMINAL PROCEDURE BY EXECUTIVE ORDER.

By section 2 of the Panama Canal Act of August 24, 1912 (37 Stat. 561), the President is prohibited from amending sections 342, 368 and 461 of the Penal Code, and repealing section 47 of the Code of Criminal Procedure of the Canal Zone.

Section 23 of the Code of Criminal Procedure of the Canal Zone may be amended by the President by virtue of section 7 of the Panama Canal Act, which authorizes him to establish by order rules governing the magistrates' courts.

DEPARTMENT OF JUSTICE,
October 14, 1914.

SIR: You have transmitted to me draft of an Executive order to amend sections 342, 368, and 461 of the Penal Code of the Canal Zone, which draft of order has been submitted by the Secretary of War to the governor of the Panama

NOTE.—This opinion was temporarily withheld from publication and later released.

Canal for approval, and which has been approved by him. Also, draft of a second Executive order to amend section 23 and repeal section 47 of act No. 15, entitled "An act to establish a code of criminal procedure for the Canal Zone, Isthmus of Panama," which has been similarly submitted and approved.

You request my opinion regarding the same.

Under the act of April 28, 1904, chapter 1758, section 2 (33 Stat. 429), it was provided:

"That until the expiration of the Fifty-eighth Congress, unless provision for the temporary government of the Canal Zone be sooner made by Congress, all the military, civil, and judicial powers as well as the power to make all rules and regulations necessary for the government of the Canal Zone and all the rights, powers, and authority granted by the terms of said treaty to the United States shall be vested in such person or persons and shall be exercised in such manner as the President shall direct for the government of said Zone and maintaining and protecting the inhabitants thereof in the free enjoyment of their liberty, property, and religion."

In an opinion rendered by the Attorney General to the President under date of January 30, 1907 (26 Op. 113), it was held that, by the terms of the above statute, "its effect is limited to the duration of the Fifty-eighth Congress, but I do not understand this as meaning that Congress intended the Canal Zone to be without any legal government after the period fixed," and that—

"In the absence of action by Congress distinctly denying him that right and establishing by law a state of anarchy in the Canal Zone, the President would have the power to administer this territory, merely because control, with the incidents of sovereignty, over it was possessed by the United States, and no other provision for its orderly government had been made."

In pursuance of the above powers various acts, entitled "Laws of the Canal Zone, Isthmus of Panama," were enacted by the Isthmian Canal Commission, beginning with

August 16, 1904, and continuing until the year 1912. The enacting clause of each of these statutes was as follows:

“By authority of the President of the United States, be it enacted by the Isthmian Canal Commission.”

These various acts provided for the organization of a judiciary and the exercise of judicial powers; the organization of the municipal government in the Canal Zone; provisions for sanitary rules and regulations for the Canal Zone; establishment of a penal code and a code of criminal procedure for the Canal Zone; and various other purposes.

From time to time these acts were amended by the Isthmian Canal Commission and also by Executive orders issued by the President himself, one of such orders, namely, Executive order of March 13, 1907, issued by President Roosevelt, being the subject of one of the amendments in the proposed Executive order now transmitted by you to me.

The temporary administration of the Panama Canal Zone, provided for as above, was terminated by the enactment by Congress of the act of August 24, 1912, chapter 390 (37 Stat. 560), entitled “An act to provide for the opening, maintenance, protection, and operation of the Panama Canal, and the sanitation and government of the Canal Zone.” Under section 2 it was provided:

“That all laws, orders, regulations, and ordinances adopted and promulgated in the Canal Zone by order of the President for the government and sanitation of the Canal Zone and the construction of the Panama Canal are hereby ratified and confirmed as valid and binding until Congress shall otherwise provide. The existing courts established in the Canal Zone by Executive order are recognized and confirmed to continue in operation until the courts provided for in this Act shall be established.”

Under section 4, the President was authorized to discontinue the Isthmian Canal Commission and “thereafter to complete, govern, and operate the Panama Canal and govern the Canal Zone, or cause them to be completed, governed, and operated, through a governor of the Panama Canal and such other persons as he may deem competent to discharge the various duties connected with the completion,

care, maintenance, sanitation, operation, government, and protection of the canal and Canal Zone."

In accordance with this provision, the President subsequently discontinued the Isthmian Canal Commission and appointed a governor of the Canal Zone.

Under section 7 it was provided:

"That the governor of the Panama Canal shall, in connection with the operation of such canal, have official control and jurisdiction over the Canal Zone and shall perform all duties in connection with the civil government of the Canal Zone, which is to be held, treated, and governed as an adjunct of such Panama Canal. Unless in this Act otherwise provided all existing laws of the Canal Zone referring to the civil governor or the civil administration of the Canal Zone shall be applicable to the governor of the Panama Canal, who shall perform all such executive and administrative duties required by existing law."

This section further provided for a magistrate's court, superseding the courts established by the previous acts of the Isthmian Canal Commission. Power was given to the President to establish, by order, "The rules governing said courts and prescribing the duties of said magistrates and constables, oaths and bonds; the times and places of holding such courts; the disposition of fines, costs, forfeitures, enforcements of judgments, providing for appeals therefrom to the district court, and the disposition, treatment, and pardon of convicts."

Under section 8 provision was made for a district court for the Canal Zone, a district judge and district attorney and marshal, and their jurisdictions, terms of office, power, etc.

Under section 9 it was provided:

"All laws of the Canal Zone imposing duties upon the clerks or ministerial officers of existing courts shall apply and impose such duties upon the clerks and ministerial officers of the new courts created by this Act having jurisdiction of like cases, matters, and duties.

"All existing laws in the Canal Zone governing practice and procedure in existing courts shall be applicable

and adapted to the practice and procedure in the new courts."

Under section 10, the governor of the Panama Canal Zone was given the power "to make such rules and regulations, subject to the approval of the President, touching the right of any person to remain upon or pass over any part of the Canal Zone as may be necessary."

Under section 14 Congress expressly reserved the right to alter, amend, or repeal any or all of the provisions of the act, or to extend, modify, or annul any rule or regulation made under its authority.

As stated above, in section 2 of the act, Congress ratified and confirmed as valid and binding all laws theretofore adopted for the Canal Zone by order of the President "until Congress shall otherwise provide."

In my opinion, the effect of this section is to abrogate the power formerly possessed by the President to enact laws for the Canal Zone through the Isthmian Canal Commission; and under this section the laws, orders, regulations, and ordinances adopted and promulgated in the Canal Zone by order of the President prior to the enactment of the Panama Canal Act of 1912, and then in force, may not be changed or repealed except by Congress.

While section 4 empowers the President to govern and operate the Canal Zone through a governor, such government and operation must, of course, be subject to the provisions of the act itself, and can not be deemed to include a power to pass laws or to amend laws when Congress has in this same act stated that all laws previously passed are to be valid and binding "until Congress shall otherwise provide."

In sections 5 and 7 of the act Congress has given to the President express powers to make regulations of a limited character; this would have been unnecessary if the intent had been that he should still retain also the general power to make laws and regulations.

A consideration of the proceedings and debates in Congress relating to the bill (H. R. 21969), which finally became the Panama Canal Act of 1912, shows conclusively

that the intent of Congress was to abrogate the power previously existing in the President.

Thus, in the report accompanying the introduction of the bill in the House of Representatives, it is stated:

"This section is intended to ratify and confirm existing laws and organizations under which the Canal Zone is governed and the canal is being constructed. The existing judicial system is likewise recognized and confirmed. While not regarded as absolutely essential, all this is deemed appropriate for the reason that at the end of the Fifty-eighth Congress, in default of renewed legislation, the law for the temporary government lapsed, and the President not only preserved the status established under the temporary provision but also extended and continued the exercise of all necessary authority and functions of government de facto in so far and whenever necessary authority was found not to have been conferred by the canal act and various subsequent acts of Congress. The committee approves of the course pursued by the Executive and recommends legislative approval thereof as appropriate."

(Cong. Rec., 62d Cong., 2d sess., vol. 48, p. 3493.)

In his speech explaining the bill, Congressman Adamson (who introduced it) said:

"In order to be sure that there can be no sort of criticism, no question of the legitimacy and regularity, we provide in the second section of this bill and approve all the laws now in force on the zone and recognize and sanction all the courts that are now on the zone. There we cut short the one-man power connected with the administration. That, of course, leaves it to the United States Government to make future legislation, the question of amending the laws, and the courts of law, and as to all civil institutions—everything of that sort remains with Congress.

"We did not undertake in this bill to revise and reform the entire system of law. We did not have time to do it."

(Ibid., p. 6572.)

See also debate in the House (ibid.), pages 6762, 6763, 6772, and debate in the Senate, pages 10214 and 10287.

I am of the opinion, therefore, that the proposed amendment to sections 342, 368, and 461 of the Penal Code of the Canal Zone are not within your Executive power.

The Executive order which proposes to repeal section 47 of act No. 15 seems likewise to be not within your authority.

The Executive order which proposes to amend section 23 of act No. 15 so as to read as follows:

“Whenever a person arrested, charged with an offense cognizable by a magistrate, is brought to trial he shall give the names of his witnesses, if he has any, and their places of abode; and the magistrate shall forthwith issue a summons for such witnesses to testify in the cause. The summons shall state the date, hour and place of trial, and if the witnesses fail to appear the magistrate shall have power to issue an attachment for them compelling their attendance. If after the examination as to the cause for nonappearance the magistrate is satisfied that the absence is intentional, he shall have the power to fine said witness for nonattendance. The fine that may be imposed shall not exceed two dollars and fifty cents, (\$2.50), and in default thereof he shall commit the person fined not exceeding five days,” would seem to be within your authority under the provisions of section 7 of the act of August 24, 1912, which authorizes you to establish by order “The rules governing the magistrates’ courts and prescribing the duties of said magistrates,” etc.

But as I understand from the explanation transmitted by the Secretary of War that the amendment of said section 23 is only desired in case said section 47 is to be repealed, I assume that you will not desire to put in force the Executive order relative to said section 23, in the absence of authority to repeal said section 47.

Respectfully,

T. W. GREGORY.

TO THE PRESIDENT.

CANADIAN BOUNDARY WATERS.

Section 3109 of the Revised Statutes, in imposing certain restrictions upon masters of foreign vessels which are not imposed upon masters of domestic vessels, is in conflict with the provisions of article 1 of the convention concerning the boundary waters between the United States and Canada, concluded January 11, 1909, between the United States and Great Britain.

Section 3109 of the Revised Statutes being incompatible with the provisions of the later self-executing treaty of January 11, 1909, the former must be regarded as superseded by the latter in so far as it is inconsistent therewith, and hence it is the duty of the administrative officers of the Government to fulfill the requirements of the treaty.

DEPARTMENT OF JUSTICE,

April 2, 1915.

SIR: I have the honor to acknowledge receipt of your letter of January 30, 1915, inclosing copies of correspondence of the Department of State with the Department of Commerce and the British Embassy in relation to representations made by the Embassy to your Department to the effect that section 3109 of the Revised Statutes appears to be in conflict with article 1 of the convention concerning the boundary waters between the United States and Canada, concluded January 11, 1909, between the United States and Great Britain. You request my opinion upon the same.

Revised Statutes, section 3109, as amended by the act of February 17, 1898 (30 Stat. 248), is as follows:

"The master of any foreign vessel, laden or in ballast, arriving, whether by sea or otherwise, in the waters of the United States from any foreign territory adjacent to the northern, northeastern, or northwestern frontiers of the United States, shall report at the office of any collector or deputy collector of the customs, which shall be nearest to the point at which such vessel may enter such waters; and such vessel shall not transfer her cargo or passengers to another vessel or proceed farther inland, either to unlade or take in cargo, without a special permit from such collector, or deputy collector, issued under and in accordance with such general or specific regulations as the Secretary

of the Treasury may, in his discretion, from time to time prescribe. This section shall also apply to trade with or through Alaska. For any violation of this section such vessel shall be seized and forfeited."

Article 1 of the convention referred to above is as follows (36 Stat. 2449) :

"The High Contracting Parties agree that the navigation of all navigable boundary waters shall forever continue free and open for the purposes of commerce to the inhabitants and to the ships, vessels, and boats of both countries equally, subject, however, to any laws and regulations of either country, within its own territory, not inconsistent with such privilege of free navigation and applying equally and without discrimination to the inhabitants, ships, vessels, and boats of both countries.

"It is further agreed that so long as this treaty shall remain in force, this same right of navigation shall extend to the waters of Lake Michigan and to all canals connecting boundary waters, and now existing or which may hereafter be constructed on either side of the line. Either of the High Contracting Parties may adopt rules and regulations governing the use of such canals within its own territory and may charge tolls for the use thereof, but all such rules and regulations and all tolls charged shall apply alike to the subjects or citizens of the High Contracting Parties and the ships, vessels, and boats of both of the High Contracting Parties, and they shall be placed on terms of equality in the use thereof."

It will be seen that section 3109 of the Revised Statutes imposes certain restrictions upon the masters of foreign vessels with respect to the duty to report to the collector of customs and the right to transfer cargo or passengers, or to proceed further inland, which are not imposed upon the masters of domestic ships. The treaty provides that the navigation of boundary waters between the two countries for purposes of commerce shall be free and open, subject only to such laws and regulations, not inconsistent with the privilege of free navigation, as shall apply equally and without discrimination to the inhabitants, ships, vessels, and boats of both countries. In other words, such navi-

gation shall not be subject to laws and regulations which are discriminatory. There is, therefore, in my opinion, a clear conflict between the provisions of the treaty and section 3109 of the Revised Statutes, for, since that section relates only to foreign vessels, it constitutes a discriminatory law or regulation to which, under the terms of the treaty, British ships would not be subject.

It is well settled by the decisions of the United States Supreme Court that treaty provisions, which are self-executing in the sense that they require no additional legislation to make them effective, are equivalent to and of like obligation with an act of Congress. The Constitution declares that both shall be the supreme law of the land and both are equally binding upon the courts. *Foster v. Neilson* (1829), 2 Pet. 253, 314; *The Cherokee Tobacco* (1870), 11 Wall. 616, 621; *Chew Heong v. United States* (1884), 112 U. S. 536, 539; *Head Money Cases* (1884), 112 U. S. 580, 599; *Whitney v. Robertson* (1888), 124 U. S. 190, 194.

Where such a treaty is in conflict with an act of Congress, that which is later in date will control. A treaty may supersede or abrogate a prior act of Congress, and an act of Congress similarly may abrogate or supersede a prior treaty. *Foster v. Neilson*, *supra*; *The Cherokee Tobacco*, *supra*; *Whitney v. Robertson*, *supra*; *Head Money Cases*, *supra*; *Botiller v. Dominguez* (1889), 130 U. S. 238, 247; *The Chinese Exclusion Case* (1889), 130 U. S. 581, 600; *Horner v. United States* (1892), 143 U. S. 570, 578; *United States v. Old Settlers* (1893), 148 U. S. 427, 468; *Fong Yue Ting v. United States* (1893), 149 U. S. 698, 720; *Lem Moon Sing v. United States* (1895), 158 U. S., 538, 549; *Wong Wing v. United States* (1896), 163 U. S. 228, 230; *Thomas v. Gay* (1898), 169 U. S. 264, 271; *Stephens v. Cherokee Nation* (1899), 174 U. S. 445, 483, 484; *La Abra Silver Mining Co. v. United States* (1899), 175 U. S. 423, 460; *De Lima v. Bidwell* (1901), 182 U. S. 1, 195; *United States v. Lee Yen Tai* (1902), 185 U. S. 213, 220, 221; *Hijo v. United States* (1904), 194 U. S. 315, 324; *Sanchez v. United States* (1910), 216 U. S. 167, 175-176.

Article I of the treaty of January 11, 1909, confers rights upon the inhabitants and ships of the contracting nations by force of its own provisions which require no legislation to make them effective, and is clearly self-executing within the meaning of the authorities above cited. In *Johnson v. Browne*, 205 U. S. 309, 321, it was said:

“Repeals by implication are never favored, and a later treaty will not be regarded as repealing an earlier statute by implication, unless the two are absolutely incompatible and the statute cannot be enforced without antagonizing the treaty.”

In the present instance section 3109 of the Revised Statutes is in my opinion so clearly incompatible with the provisions of the later treaty that it must be regarded as superseded by the latter in so far as it is inconsistent therewith. It is, therefore, in my opinion, the duty of the officials, whose function it is to administer the laws and regulations relating to commerce upon the Great Lakes, to fulfill, by proper administrative action, the requirements of the treaty and it is not necessary that the statute should be expressly repealed. As already pointed out, a treaty made under the authority of the United States is equally with an act of Congress the supreme law of the land and is binding upon the administrative officers of the Government as well as upon the courts.

As to the duties of the master of a foreign ship under Revised Statutes, section 2774, referred to in the correspondence from the Department of Commerce, I express no opinion, as the question does not appear to be now involved.

Respectfully,

T. W. GREGORY.

TO THE SECRETARY OF STATE.

PANAMA CANAL—ANTI-TRUST LAWS.

Under the provisions of section 11 of the Panama Canal Act of August 24, 1912 (37 Stat. 567), the question whether the person or corporation who owns, operates or controls any vessel seeking passage through the canal is doing business in violation of the anti-trust laws is to be determined by the final judgment or decree of a court of the United States of competent jurisdiction.

Where a vessel seeking passage through the canal is owned or operated by persons against whom no judgment that they have violated the anti-trust laws has been rendered by a court of competent jurisdiction, there is upon the officials of the canal no duty to refuse to permit the vessel to pass.

Where the vessel is operated or controlled by a person or company against whom a judgment has been rendered under the anti-trust laws in a court of competent jurisdiction, if the proceeding was at the instance of the United States and resulted in a decree designed to restore competitive conditions, and no question has been raised by the United States in appropriate judicial proceedings as to noncompliance with such decree, it should not be refused passage through the canal.

Should a case come to the attention of the canal authorities, where the judgment was a conviction under the criminal sections of the Sherman law or was a judgment in a suit brought by private parties, they might well require some affirmative showing by affidavit or otherwise that the violations had ceased.

DEPARTMENT OF JUSTICE,

April 19, 1915.

SIR: I have the honor to reply to your communication of March 18, 1915, in which you request my opinion upon certain questions as to the construction of section 11 of the Panama Canal Act (37 Stat. 560, 567).

The provisions of the section in question are as follows:

"No vessel permitted to engage in the coastwise or foreign trade of the United States shall be permitted to enter or pass said canal if such ship is owned, chartered, operated, or controlled by any person or company which is doing business in violations of the provisions of the Act of Congress, approved July second, eighteen hundred and ninety, entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies,' or the provisions of sections seventy-three to seventy-seven, both inclusive, of an Act approved August twenty-seventh, eighteen

hundred and ninety-four, entitled 'An Act to reduce taxation, to provide revenue for the Government and for other purposes,' or the provisions of any other Act of Congress amending or supplementing the said Act of July second, eighteen hundred and ninety, commonly known as the Sherman Antitrust Act and amendments thereto, or said sections of the Act of August twenty-seventh, eighteen hundred and ninety-four. The question of fact may be determined by the judgment of any court of the United States of competent jurisdiction in any cause pending before it to which the owners or operators of such ship are parties. Suit may be brought by any shipper or by the Attorney General of the United States."

The specific questions upon which my opinion is asked are four in number and are stated severally below.

(a) "Whether the question of fact that the person or corporation who owns, operates or controls any vessel seeking passage through the canal 'is doing business' in violation of the Sherman law, as amended, should be administratively determined or whether the statute does not require determination thereof by the judgment of a competent court of the United States."

Whilst the section provides that the question of fact, whether a given vessel is owned or operated by any person who is violating the anti-trust laws, *may* be determined by any court of the United States of competent jurisdiction, there are persuasive reasons for construing this language as mandatory rather than permissive, the chief one being that the question to be determined is essentially judicial in character, and Congress can not be presumed to have intended to attempt to invest administrative officers with judicial powers in the absence of an express declaration to that effect.

I am of opinion, therefore, that the question whether the person or corporation who owns, operates, or controls any vessel seeking passage through the canal is doing business in violation of the anti-trust laws is to be determined by the final judgment or decree of a court of the United States of competent jurisdiction.

(b) "Whether pending such determination there is any duty upon the canal authorities to refuse to permit a vessel to pass through the canal."

The debates in Congress show that certain of the Members in both Houses objected to the provision because, as they thought, it denied the use of the canals to vessels of the class described until it could be judicially determined whether they were owned or operated by any person violating the anti-trust laws, and much was said of the hardships and injustice which such a course would entail (48 Cong. Rec. 11059, 11060, 11210, 11217). Replying to these criticisms Senator Reed, the author of the provision, stated that it only applied to cases where the question of fact had been judicially determined before the vessel made application to enter the canal, and that "no court on earth will hold that it applies to a vessel the owners of which have not been convicted of violating the act" (48 Cong. Rec. 11060).

The construction placed upon the provision by its author is supported by the principle that where a statute is susceptible of two constructions, it will be given the one which best comports with the principles of reason, justice, and convenience (*Lewis' Sutherland on Statutory Construction*, sections 488-490).

I am of the further opinion, therefore, that where a vessel seeking passage through the canal is owned or operated by persons against whom no judgment that they have violated the anti-trust laws has been rendered by a court of competent jurisdiction, there is upon the officials of the canal no duty to refuse to permit the vessel to pass.

(c) "Whether after such determination, the statute does require that the vessel be refused passage through the canal until a satisfactory showing is made that the vessel is no longer operated or controlled by any person or company which is doing business in violation of the law?"

I take this inquiry to relate to cases in which a vessel is operated or controlled by a person or company which has been a defendant in a proceeding in the United States courts under the anti-trust laws and against whom a judgment has resulted.

If the proceeding was at the instance of the United States and resulted in a decree designed to restore competitive conditions, and no question has been raised by the United States in appropriate judicial proceedings as to noncompliance with such decree, I think the vessel should not be refused passage.

Where the judgment was a conviction under the criminal sections of the Sherman law or was a judgment in a suit brought by private parties there is perhaps not the implication that the illegal conditions have been remedied. Where such a case comes to the attention of the canal authorities, they might well require some affirmative showing by affidavit or otherwise that the violations had ceased. In this connection attention is called to the suggestion in my letter of March 5, 1915.

(d) "Whether past conviction of any person or company who owns, operates or controls the vessel seeking passage through the canal can be regarded as requiring the administrative officers to refuse passage to such vessel until a showing is made that such persons or corporations are no longer doing business in violation of the law?"

If I understand correctly what is asked in this inquiry it is answered by what I have said in response to inquiry (c).

Very respectfully,

T. W. GREGORY.

TO THE SECRETARY OF WAR.

NATIONAL FORESTS—GENERATION OF ELECTRICITY.

Under section 4 of the act of February 1, 1905 (33 Stat. 628), a right of way may be granted through the national forests when the objective is to employ the right of way in a process of "milling and reduction of ores," and it is unobjectionable that the intermediate purpose is to generate and use electricity.

DEPARTMENT OF JUSTICE,

April 21, 1915.

SIR: The fourth section of the act of February 1, 1905 (ch. 288, 33 Stat. 628), provides:

"That rights of way for the construction and maintenance of dams, reservoirs, water plants, ditches, flumes,

pipes, tunnels, and canals, within and across the forest reserves of the United States, are hereby granted to citizens and corporations of the United States for municipal or mining purposes, and for the purposes of the milling and reduction of ores, during the period of their beneficial use, under such rules and regulations as may be prescribed by the Secretary of the Interior, and subject to the laws of the State or Territory in which said reserves are respectively situated."

Your letter of November 9, 1914, requests my opinion whether, under this law, a right of way may be granted through the national forests "for the development of hydroelectric power." From earlier correspondence it appears that the question grows out of an application for a right of way for a canal and pipe line which the applicant desires to employ in the generation of electricity, to be used, in turn, by him in the manufacture of Portland cement.

In the case of *Northern California Power Company*, 37 L. D., 80, 81, it was held that this section does not apply when the object, or principal object, of the applicant is to make a business of selling generally the electrical power. It was there said that, while it was unnecessary to determine the exact nature of the grant intended by the section, it was clear that the uses authorized were limited to municipal and mining purposes, including the milling and reduction of ores; that the act evidently was drawn in the interest of municipalities and miners only, and that the limitations upon the use of the privilege granted were "such as to authorize, if not demand, special scrutiny of the purposes of the projectors of the enterprise before giving approval to an application filed under said act."

In *Alaska Treadwell Gold Mining Company*, 40 L. D., 426, your Department, holding the section applicable in Alaska, said that the rights and uses described therein, "with the exception of municipal use, are all for purposes connected with or incident to mining." The record there considered showed that electrical power was to be produced, but the ultimate purposes were not specified, and therefore your Department did not undertake to decide whether the

application conformed to the statute. Your letter, however, states:

"That it has been the practice of the Department to approve such rights of way ever since the enactment of the law and departmental decisions in the cases of the Northern California Power Company, 37 L. D., 80, and the Alaska Treadwell Mining Company, 40 L. D., 426, proceed on the theory that the statute authorizes the acquisition of such rights of way for hydroelectric development for municipal and mining purposes and for the milling and reduction of ores."

I am of the opinion that this practice should not be disturbed. The policy of this law is, in part, to foster the industry of mining, and it should be reasonably construed with that end in view. The value of electricity in mining, and in the allied processes of milling and reducing the ores mined, was well understood when the act was passed, and wide advantage had been taken of it in various ways. Hence, to hold, in the face of the broad language employed, that there was an intention to provide only for direct applications of the water—as in hydraulic mining, or in the sorting and solution processes of milling—and not to provide for any of the wider applications of which the power in falling water is susceptible through its mere conversion into a different form of energy, would be to rob the statute of much of its utility without any assignable cause.

Assuming, then, that the objective of the applicant in the specific case before you is to employ the right of way in a process of "milling and reduction of ores" (and that is so largely a question of fact that I think it should be disposed of by your Department), I conclude that the intermediate purpose, to generate and use electricity, is unobjectionable.

Very respectfully,

T. W. GREGORY.

TO THE SECRETARY OF THE INTERIOR.

OFFICIAL MAIL MATTER—FRANKING PRIVILEGE.

Official matter consisting of postage stamps, internal-revenue stamps, stamped envelopes, newspaper wrappers, and postal cards must be carried in the mails free regardless of weight.

All other official matter must be carried in the mails free if within the limit of weight applicable to matter of the same class that must be received if offered for transmission, postage paid, by private persons.

Opinion of February 28, 1913 (20 Op. 112), adhered to.

DEPARTMENT OF JUSTICE,

April 30, 1915.

SIR: I have the honor to acknowledge receipt of your letter of April 2, instant, with inclosures, wherein you request that I review an opinion rendered on February 28, 1913 (30 Op. 112), by my predecessor to the Secretary of the Interior treating of the maximum weight limit of matter transmissible for departments of the Government and departmental officers under the penalty privilege.

I am convinced that official matter consisting of postage and internal-revenue stamps, stamped envelopes, newspaper wrappers, and post cards must be carried free regardless of weight, and that other official matter must be carried free if within the limit of weight applicable to matter of the same class that must be received if offered for transmission, postage paid, by private persons; and that the opinion of my predecessor correctly stated the law in that regard. My reasons are:

I.

Before March 3, 1877, the executive departments of the Government always paid postage on all mail matter. (Sec. 3896, 3897, 3915, Revised Statutes.) Indeed, an amendment of the last-named section passed but four days before, provided that special department stamps should be—

“* * * sold or furnished to said several Departments or clerks only at the *price* for which stamps and stamped envelopes of like value are sold at the several post-offices.” (Act of Feb. 27, 1877; 19 Stat. 250.)

Nearly all mail matter was then limited to 12-ounce maximum (sec. 3877, R. S.) and no package (except books published or circulated by order of Congress) weighing over 4 pounds could then be received for conveyance by mail. (Sec. 3878, R. S.)

II.

The free transmission privilege was first given by section 5 of the act of March 3, 1877 (19 Stat. 335), on the sole condition that the letters, packages, or matters sent must relate exclusively to the business of the Government of the United States. This resulted (in connection with sec. 3878, *supra*) in free official matter, including congressional books, which latter, at least, could exceed 4 pounds. While all mail had theretofore been of three classes, two years later, on March 3, 1879, four classes were created. As to the fourth class, the maximum weight receivable in the mails was declared to be—

“* * * not exceeding four pounds for each package thereof, except in case of single books weighing in excess of that amount, and except for books and documents published or circulated by order of Congress, or official matter emanating from any of the departments of the government.” (Sec. 20, 20 Stat. 360.)

This section preserved the old maximum weight and the original exception as to congressional books; added a new exception as to single books; and clearly declared that the free privilege given two years before should be unlimited as to weight.

Section 29 of the same act extended section 5, *supra*, to the Smithsonian Institute and to all official mail matter transmitted between any executive departments or officers of the Government whose compensation did not include postage. And five years later section 5 was extended to all officers of the United States except Members of Congress, and section 3915, Revised Statutes, was repealed. (Act July 5, 1884; 23 Stat. 158.) Clearly at that time the free privilege was unlimited as to weight. Indeed, the Post Office Department was so advised for its administrative

guidance by its own Solicitor on December 20, 1884 (letter of A. A. G. Tyner, found in Senate Report 306, 54th Cong., 1st sess.).

III.

On *June 8, 1896*, and because the frank was being used to handle weighty freight matter (Senate Report 306, *supra*) the exception as to "official matter" was limited to "*written or printed official matter*," thereby bringing within the operation of the general 4-pound limit provision all official matter not printed or written. (29 Stat. 262.) This is made plain by the remarks of Chairman Loud of the Post Office Committee:

"It [the proposed bill] would confine all mailable matter outside of printed and written matter just the same as we confine it to each individual in the country, to 4 pounds weight."

Because the last limitation was being disregarded, 10 years later, on June 26, 1906, Congress reduced the classification of free official matter that should be unlimited as to weight, to postal stamps, stamped envelopes, newspaper wrappers, post cards, and internal-revenue stamps; and declared, as to all other official matter, that the same should not be admitted free to the mails unless it was of a kind such as if offered by a private person, must be received on payment of proper postage. (34 Stat. 477; H. Report 2405, 59th Cong., 1st sess.; remarks of Chairman Overstreet, Part V, 40th Cong. Rec., same Congress, p. 4748.)

IV.

To hold with the Third Assistant Postmaster General, we must read the act of 1906 as adopting by reference the then existing law as to weight limit as completely as if copied at large therein. The phrase ordinarily used for such purpose—"as now provided by law"—is lacking. The language used is neither apt for that purpose, nor is it susceptible of such a reading. It rather indicates a plain purpose to put all official mail save postage stamps, etc., on the same footing as private mail from time to time; with the result that any change in conditions as to the latter

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would necessarily affect the former, and Congress must be deemed to have known this when it enacted the Parcels Post Act (37 Stat. 557, 558).

V.

Such has been the administrative construction of the acts of 1906 and 1902 by the Post Office Department (sec. 512½, p. 74, Postal Laws and Regulations of 1907; sections 499, 462-a, 463, and 454, Postal Laws and Regulations of 1913).

Respectfully,

T. W. GREGORY.

TO THE POSTMASTER GENERAL.

MARBLE FOR LINCOLN MEMORIAL—EIGHT-HOUR LAW.

A subcontractor furnishing cut and finished marble for the Lincoln Memorial should be excepted from the operation of the eight-hour law of June 19, 1912 (37 Stat. 137), if it be found that such marble is a material or article which is usually manufactured in standard forms for the general market and which producers or dealers usually offer for sale in the course of their business.

DEPARTMENT OF JUSTICE,

May 12, 1915.

SIR: I have the honor to acknowledge the receipt of your letter of March 18, 1915, in which you ask my opinion as to whether the act of June 19, 1912 (37 Stat. 137), commonly known as the eight-hour act, authorizes you to compel a compliance with its provisions on the part of the subcontractor furnishing the marble for the Lincoln Memorial, now in course of construction in this city, under a contract entered into by you and to be executed under your supervision, in accordance with the act of February 9, 1911, creating the Lincoln Memorial Commission (36 Stat. 898). It appears that Colorado marble of certain quality and dimensions is called for by the contract and is procured by the contractor from the subcontractor, who supplies it in finished form.

The eight-hour act applies generally to all contracts on behalf of the Government requiring the employment of

laborers or mechanics, either by those contracting with the Government or by subcontractors. It seems clear, therefore, that the subcontract here in question is subject to the act, unless it falls within that provision of section 2 which takes out of the operation of the act "contracts * * * for such materials or articles as may usually be bought in open market, except armor and armor plate, whether made to conform to particular specifications or not."

This exception has been considered in opinions heretofore rendered (29 Op. 534; 30 Op. 24, 31, 49, 133, 211). In the enforcement of the exception, however, difficulties continue to arise, which a careful review of these opinions leads me to believe are due principally to a lack of definition of the terms of the exception.

The act was intended to *extend* the policy of the eight-hour day for laborers and mechanics employed on Government work—a policy which for many years had been in force as to works of construction carried on by the Government, and which had been repeatedly recognized and declared by acts of Congress (29 Op. 371, 372, 373; also 284, 492). Section 1 provides in effect that the eight-hour day shall obtain under *every contract* made for or on behalf of the United States, requiring the employment of laborers or mechanics, whether such employment is by contractors or subcontractors. It was recognized, however, that the necessities of the case required some exceptions (29 Op. 505, 534). These were made by section 2; among them the exception here in question.

The language of the exception, "contracts for such materials or articles as may usually be bought in open market," necessarily implies that there are materials or articles which may *not* usually be bought in the open market. The expression thus divides contracts for articles and materials into two classes—one class subject to the act, and the other excepted from its operation; the basis of classification being whether or not the materials or articles contracted for are *of the kind* that "may usually be bought in open market."

The question then becomes: What is the test as to whether materials or articles may usually be *bought in open market*?

Some materials or articles are *usually* "ordered" for specific purposes and "made" according to particular specifications. Other materials or articles are manufactured in stock or standard forms and supplied to the trade generally. They are usually found in stock, and are "bought" from producers or dealers. In common parlance, they are "bought" and "sold" "in the open market," or "in the general market," as distinguished from materials and articles of the other class which are not usually "bought in open market," but are usually ordered to be made.

This use of the phrases "open market" and "general market" is illustrated in the following cases:

Referring to a notice to retailers printed on packages of a patented article attempting to fix a minimum retail selling price, it is said in *Bauer v. O'Donnell*, 229 U. S. 1, 16:

"The packages were sold with as full and complete title as any article could have when sold *in open market*, excepting only the attempt to limit the sale or use when sold for not less than one dollar."

In *Schloss v. Josephs*, 98 Minn. 442, 444, discussing the instructions given the jury in a case involving a contract for certain suits of clothing to be made to order, this language is used:

"It does not conclusively appear from the evidence that the clothing ordered in this case was of such standard and uniform varieties as could be disposed of in the *open market*, and if there was any dispute about it the court did not commit error in taking the opinion of the jury upon the question of whether the contract amounted to a sale of clothing such as ordinarily made by manufacturers and wholesale houses and purchased and dealt in by retail dealers, or whether the contract was for the manufacture of clothing of such peculiar pattern and materials as would not in the general course of trade have been otherwise manufactured."

In *Goddard v. Binney*, 115 Mass. 450, 454, 15 Am. Rep. 112, construing the seventeenth section of the statute of frauds, this passage is found:

"The effect of these decisions we understand to be this, namely, that a contract for the sale of articles then existing, or such as the vendor in the ordinary course of his business manufactures or procures for the *general market*, whether on hand at the time or not, is a contract for the sale of goods, to which the statute applies. But on the other hand, if the goods are to be manufactured especially for the purchaser, and upon his special order, and not for the *general market*, the case is not within the statute."

The meaning and purpose of the phrase, "whether made to conform to particular specifications or not," remains to be considered.

Contracts for materials and articles are commonly classified as "contracts for labor and materials" and "contracts of sale," the distinction turning upon the nature of the contract, that is, whether or not in the particular instance the contract is for the manufacture of some material or article "to conform to particular specifications." (For authorities see 24 Amer. and Eng. Ency. of Law, 2d ed. p. 1028.) This distinction governs the application of the seventeenth section of the Statute of Frauds, the language of which, "*contracts for the sale of goods, wares, and merchandise*," is generally held to exclude contracts for materials or articles of any kind to be made to special order. (*Goddard v. Binney*, supra; *Meincke v. Falk*, 55 Wis. 427; 42 Am. Rep. 722; in re *Gies' Estate*, 160 Mich. 502; 19 Amer. and Eng. Ann. Cas. 1288; *Forsyth v. Mann*, 68 Vt. 116; 32 L. R. A. 788; 20 Cyc. 241, 242.)

In the provision here in question, however, Congress did not adopt this classification, but, as we have seen, made the operation of the exception depend upon the kind of materials or articles contracted for, that is, whether they are of a kind which may usually be bought in open market. The words, "whether made to conform to particular specifications or not," were added, I think, for the purpose of emphasizing this, and to make it perfectly clear that the test should not be the nature of the contract.

To illustrate, take a contract for iron nails. Assuming that iron nails are articles of a kind which may usually be bought in open market, such a contract would none the less fall within the exception because it called for iron nails to be made according to particular specifications.

In the light of the foregoing, it is my opinion that the exception must be held to embrace materials or articles of the kind which are usually manufactured in standard forms and which producers or dealers usually offer for sale in the course of their business, as distinguished from materials and articles of the kind which are usually made to order, or manufactured in a particular manner, shape or condition according to the specifications of the person for whom they are made.

The application of this construction—that is, the determination in particular cases of whether the articles are of a kind which are usually manufactured and offered for sale in standard forms, etc., or are of a kind which are usually made to order—obviously involves a consideration of trade conditions and of other questions of fact, and, therefore, is primarily an administrative function to be discharged by the several departments in which the cases arise.

This was recognized in the opinion of October 3, 1912, where it was said (29 Op. 534, 543):

“Generally speaking, whether a particular article or material falls within the above exception in section 2 is a matter of administration, and the decision of an administrative officer thereon would certainly not be lightly overruled.”

As regards the opinion of August 1, 1913 (30 Op. 211), to which you refer, I think that, instead of himself deciding that the specific article there in question was within the exception, the Attorney General should have defined the meaning of the exception and then left it to the Treasury Department to apply the definition to that particular case.

It follows that if you find that marble cut and finished for use in building construction is a material or article which is usually manufactured in standard forms for the

general market and which producers or dealers usually offer for sale in the course of their business, the subcontract should be excepted from the operation of the statute. If, on the other hand, you find that it is not such a material or article, but a material or article usually made to order or manufactured in a particular manner, shape or condition, according to the specifications of the person for whom made, then the subcontract is subject to the operation of the act, and you should compel compliance with its provisions on the part of the subcontractor.

Respectfully,

T. W. GREGORY.

To the SECRETARY OF WAR.

— — —
RIO GRANDE BOUNDARY.

Under a provision of the Diplomatic and Consular appropriation act of March 4, 1915 (38 Stat. 1120), the Secretary of State may direct an investigation as to any or all tributaries within the United States, whether or not flood streams, which may contribute to the flood conditions in the Rio Grande affecting the boundary line between the United States and Mexico.

Congress has plenary power to authorize an investigation of non-navigable streams within a State whenever, in the judgment of Congress, such action is necessary for the preservation of the navigability of its waterways, or for the maintenance with certainty and without fluctuation of the international boundary lines of the United States.

DEPARTMENT OF JUSTICE,

May 17, 1915.

SIR: I have the honor to acknowledge receipt of your letter of March 17, and also your letter of March 29, 1915, inclosing a memorandum prepared by the Acting Solicitor for the State Department, with reference to certain provisions of the Diplomatic and Consular appropriation acts of June 30, 1914, and March 4, 1915. The questions upon which you have requested my opinion, as stated by you, are as follows:

"1. Whether or not the Department of State or the Secretary of State is duly authorized to make this 'investiga-

tion and report' called for by the said act of March 4 (and in *effect* in the parent act of June 30, 1914, aforesaid), limiting the 'investigation and report' to those 'tributaries' of the Rio Grande boundary, which rise in New Mexico, flow therefrom into and through Texas, into said boundary, and those which head in Texas, course through the State, and into said boundary, all of which tributaries are 'flood' streams, and empty their 'flood waters' into the Rio Grande boundary 'channel' or the 'line' between Mexico and the United States, whereby, said 'channel' or 'line,' in various places, semiannually and annually, is swayed from one country to the other, impeding or obstructing navigation, or the navigability of said boundary, damaging or destroying other property of both Governments, and their citizens, and finally wasting in the Gulf of Mexico;

"2. There are smaller tributaries, of said boundary, entirely in Texas, which do not themselves flood, but which it may be found necessary to investigate and report on, because they may, more or less, add to the destructive 'flood waters' in the Rio Grande boundary, and I desire to know whether or not the Department of State or the Secretary of State is duly authorized to investigate and report on this class of tributaries of said boundary."

If I correctly apprehend the scope of these inquiries, they present these questions:

First. Whether the act of March 4, 1915, when properly construed, authorizes the Secretary of State to direct an investigation and report as to those tributaries of the Rio Grande rising in New Mexico and Texas which as flood streams cause variations in the boundary line of the Rio Grande and impede navigation thereof.

Second. Whether said act authorizes a similar investigation and report as to those tributaries of the Rio Grande, entirely in Texas, which are not themselves flood streams but which contribute to the flood conditions in the Rio Grande boundary with the effects above stated.

Third. Whether said act, if in terms granting authority to make such investigations, is constitutional.

The Diplomatic and Consular appropriation act of March 4, 1915 (38 Stat. 1120), contains the following provision:

"INTERNATIONAL BOUNDARY COMMISSION, UNITED STATES AND MEXICO.

"To enable the commission to continue its work under the treaties of eighteen hundred and eighty-four, eighteen hundred and eighty-nine, and nineteen hundred and five, \$14,000: *Provided*, That \$8,000 thereof is made immediately available to resume and continue the work relating to the distribution of water, under the direction of the Secretary of State, and as authorized by and in pursuance to the protocol of May sixth, eighteen hundred and ninety-six, between the United States and Mexico, and to enable the water commissioner to study the questions connected with the equitable distribution of the waters of the Rio Grande River between the citizens of the United States and Mexico, and to make an investigation, under the supervision of the Secretary of State, as to the best and most feasible method of preserving the boundary line between the United States and Mexico by preventing the flood waters of the Rio Grande and its tributaries where the said Rio Grande constitutes said boundary line from disturbing and changing the channel, and also the best and most feasible mode of impounding, regulating, and utilizing said waters in such manner as to secure to each country and its inhabitants their legal and equitable rights and interests in said waters, and to report in detail plans, findings, and conclusions to Congress not later than December tenth, nineteen hundred and fifteen."

The appropriation of \$14,000 seems to apply only to a continuation of the work of the International Boundary Commission under the treaties named. Those treaties authorize the commission to examine into and determine all questions and differences as to the international boundary line of the Colorado and Rio Grande Rivers, which may grow out of changes in the channels or beds of those rivers, works constructed therein "or any other cause affecting the boundary line." The treaty of 1905 relates particularly to the status of small portions of land known as "bancos,"

which had become separated from the Rio Grande, when by a process of gradual erosion and avulsion the river had abandoned its old channel; and that treaty directs the boundary commission to have surveys and maps prepared of bancos which might be formed in the future.

But by the proviso immediately following, \$8,000 of the total appropriation is made immediately available for the following purposes, briefly stated:

First. To continue the work relating to the distribution of water, under the direction of the Secretary of State, and as authorized by and in pursuance of the protocol of May 6, 1896; and

Second. To enable the "water commissioner" to study the questions connected with the equitable distribution of the waters of the Rio Grande between the citizens of the United States and Mexico, and to make an investigation, under the supervision of the Secretary of State, as to the best method of preserving the boundary line between the United States and Mexico.

The protocol of May 6, 1896, referred to in this statute, directs the American and Mexican members of the International Boundary Commission, organized under the convention of March 1, 1889, to investigate and report upon certain questions relating to the regulation of the use, by the inhabitants of both countries, of the waters of the Rio Grande, in order to secure to each country and its inhabitants their legal and equitable rights in said waters.

While the subject of distribution of water between the citizens of the United States and Mexico can not be held to be strictly within the terms of the treaties of 1884, 1889, and 1905, or to be strictly a portion of the work devolving on the boundary commissioners themselves, nevertheless the relation of such distribution to the condition of the navigability of the Rio Grande, and therefore of its status as a boundary mark, may be held to be in general within the purview of the treaties. (See 26 Op. 250.)

Hence the specific authorization for the expenditure of \$8,000 made in the proviso of the act of March 4, 1915, is fairly within the general outlines of the object for which the entire appropriation of \$14,000 is made.

The proviso of the said act is, to a certain extent, ambiguous in making the appropriation of \$8,000 available to enable the "water commissioner" to study the questions therein referred to, inasmuch as there does not seem to be any official to whom that designation has been formally given by statute. Under the protocol, the duties connected with the equitable distribution of waters are imposed on the International Boundary Commission. The appropriation act of June 30, 1914 (38 Stat. 446, ch. 132), refers to "the commissioner appointed by the Secretary of State" under the treaties of 1848, 1853, 1884, and 1889 to carry on the work relating to distribution of water, and directs such commissioner to pay salaries heretofore authorized or approved by the Secretary of State "and any and all persons employed by or under the direction of the commissioner appointed by the Secretary of State to study the questions in connection with the distribution of the waters of the Rio Grande." It appears, however, that the treaties cited do not provide for any "commissioner appointed by the Secretary of State."

It appears, moreover, that for some time past there has been no American boundary commissioner appointed under said treaties; and there is none at present. There has been, however, a person employed by or under the direction of the Secretary of State known officially as "water commissioner," who has, in fact, been engaged in a study of the questions referred to in the proviso of the act of March 4, 1915.

While, therefore, both the act of 1914 and the act of 1915 are incorrectly and ambiguously phrased, I am of opinion that effect may be given to the proviso in the last-named act by holding that the Secretary of State may now employ a person to be known as a water commissioner for the purposes specified by said proviso, namely, in determining "the best and most feasible method of preserving the boundary line between the United States and Mexico, by preventing the flood waters of the Rio Grande and its tributaries * * * from disturbing and changing the channel," to make an investigation, under the direction of the Secretary of State, of any or all tributaries within the United States,

whether or not flood streams, which may contribute to the flood conditions in the Rio Grande affecting the boundary line between the two countries.

There remains to be considered the power of Congress to authorize an investigation of nonnavigable streams within the territorial limits of a State, as incidental to the preservation of the international boundary.

In *United States v. Rio Grande Dam and Irrigation Co.* (1899, 174 U. S. 690, 709) a complaint was filed in a Federal court against the company to restrain it from constructing a dam across the Rio Grande in the territory of New Mexico and appropriating the waters of that stream for purposes of irrigation. The proceedings were instituted under statutes prohibiting the creation without permission of the Secretary of War of any obstruction to the navigable capacity of any waters in respect of which the United States has jurisdiction. It was held that the act applied not only to obstructions in navigable portions of a navigable stream, but also to "any obstruction to the navigable capacity," and it was said that "anything wherever done or however done within the limits of the jurisdiction of the United States which tends to destroy the navigable capacity of one of the navigable waters of the United States is within the terms of the prohibition." In the course of its opinion the court said:

"The Hudson River runs within the limits of the State of New York. It is a navigable stream and a part of the navigable waters of the United States, so far at least as from Albany southward. One of the streams which flows into it and contributes to the volume of its waters is the Croton River, a non-navigable stream. Its waters are taken by the State of New York for domestic uses in the city of New York. Unquestionably the State of New York has a right to appropriate its waters, and the United States may not question such appropriation, unless thereby the navigability of the Hudson be disturbed. On the other hand, if the State of New York should, even at a place above the limits of navigability, by appropriation for any domestic purposes, diminish the volume of waters, which, flowing into the Hudson, make it a navigable stream, to such an ex-

tent as to destroy its navigability, undoubtedly the jurisdiction of the National Government would arise and its power to restrain such appropriation be unquestioned; and within the purview of this section it would become the right of the Attorney General to institute proceedings to restrain such appropriation."

The power to prohibit interference by a State with the navigable capacity of a navigable stream must be coextensive with the necessity. If, to secure the navigability of such stream, it is requisite to assume control of nonnavigable tributaries, Congress must be deemed to have such power, and the extent of control necessary to preserve such navigability lies in the judgment of Congress. In *Gutierrez v. Albuquerque Land & Irrigation Co.* (1903, 188 U. S. 545, 554, 555) it is said "the power of a State over navigable streams and their tributaries is further limited by the superior power of the general government to secure the uninterrupted navigability of all navigable streams within the limits of the United States." (See also 18 Op. 404; *United States v. North Bloomfield Gravel Mining Co.*, 1892, 53 Fed. 625; 1897, 81 Fed 243.)

I am further of the opinion that the establishment and maintenance of international boundaries is a function of the National Government in the exercise of the treaty-making power. This function, in order to be effective, must be, and is, exclusive and free from control or interference by the several States. The Government, having the power to fix international boundaries by treaty, must possess full authority to take all necessary steps to preserve the boundary so fixed.

I am therefore of the opinion that Congress has plenary power to authorize an investigation of nonnavigable streams within a State whenever, in the judgment of Congress, such action is necessary for the preservation of the navigability of its waterways, or for the maintenance with certainty and without fluctuation of the international boundary lines of the United States.

Respectfully,

T. W. GREGORY.

To the SECRETARY OF STATE.

NAVY REGULATIONS—COMPTROLLER'S DECISIONS.

The decisions of the Comptroller of the Treasury declaring invalid article R-3991 of the Navy Regulations of 1913, relating to the duties of pay officers of shore stations, are not conclusive upon the Navy Department.

This regulation is valid at least to the extent of protecting a pay officer in good faith paying items that on the face of the roll are apparently legal expenditures.

DEPARTMENT OF JUSTICE,
May 19, 1915.

SIR: I have the honor to acknowledge receipt of your letter of April 13, 1915, wherein you ask my opinion on the following questions:

(1) Whether certain decisions of the Comptroller (21 Comp. Dec. 245; reversed, 21 Comp. Dec. 357) deciding that article R-3991, Navy Regulations of 1913, is void, are conclusive on your Department; and

(2) If not, whether that article is a valid regulation in whole or in part.

Your first question I answer in the negative. To the second I answer valid at least to the extent of protecting a pay officer in good faith paying items that on the face of the roll are apparently legal expenditures. My reasons for these conclusions are as follows:

1. The number of pay officers for the Navy is fixed by law, and each must give a bond for the faithful discharge of his duties. (Secs. 2522, 2531, 2532, Comp. St. 1913.) They are prohibited from loaning money to brother officers (sec. 2538, *ib.*). With these exceptions there are no statutes prescribing their duties or functions. These latter spring from regulations issued from time to time by the Secretary of the Navy pursuant to section 161, Revised Statutes. These officers are amenable to article 20 of section 2969, Comp. St. 1913, which prohibits under penalty of court martial, the violation of any lawful order or regulation issued by the Secretary of the Navy. Section 161, *supra*, requires that all regulations made thereunder be *consistent with law*; while article 20, *supra*, requires that regulations whose violation it punishes, shall be *lawful*. Assum-

ing that the Secretary may not declare the degree of financial accountability to arise from a breach of duty, but that he may declare disciplinary liability, and so limiting the accountability declared by the last sentence of the regulation, I henceforth consider only the first sentence thereof.

The prime inquiry is whether it is a lawful regulation so that if a paying officer disregarded it he could be convicted under section 2969, *supra*. It is not inherently inconsistent with any law. If the rolls though signed and approved, carried items illegal on their face the officer should and would refuse to pay; for, to be a valid regulation, it must be—as it may be—read to apply only to items fair on their face. So read, it is clearly valid and the officer refusing to pay in such case would both breach his bond and render himself liable to court-martial.

Section 3678, Revised Statutes, which provides that—
“* * * all sums appropriated for the various branches of expenditure in the public service shall be applied *solely* to the objects for which they are respectively made, and no others”—

imposes a duty on these disbursing officers. But this duty does not go beyond that outlined above; i. e., to see that the roll on its face discloses an object for which an appropriation may be made. Regulations only slightly variant in terms have twice been approved by Congress. (12 Stat. 565, and sec. 1547, R. S.) For the consequences of promulgating such a regulation the Secretary is answerable to the President and the people. *United States v. Jones, infra*. The conclusion is inevitable that the first sentence of the regulation is not inconsistent with law, both because there is no provision of law prescribing duties of pay officers inconsistent therewith, and because it directs the pay officers to disburse upon evidence sufficient to satisfy the requirements of section 3678, Revised Statutes.

2. *The effect of the regulation:* Here the inquiry must be, “Has it binding force as law on the accounting officers of the Government?” For unless it has, it would have little real value. This question is one of law; not one of accounting.

In *United States v. Jones*, 18 How. 92, 95, speaking of the right of an accounting officer to review the action of the Secretary of the Navy approving certain disbursements made by a subordinate pursuant to his order, the court said:

"The Secretary of the Navy represents the President and exercises his power on the subjects confided to his department. He is responsible to the people and the law for any abuse of the powers entrusted to him. His acts and decisions, on subjects submitted to his jurisdiction and control by the constitution and laws, do not require the approval of any officer of another department to make them valid and conclusive. The accounting officers of the Treasury have not the burden of responsibility cast upon them of revising the judgments, correcting the supposed mistakes, or annulling the orders of heads of departments. * * * The liability of the defendant to refund this money to the Government is founded on the act of the accounting officer charging him with it, because in his opinion, the Secretary of the Navy had mistaken the law or abused his discretion. We are of opinion that he was not bound to assume this responsibility."

The Jones case was followed and part of the above-quoted language repeated in *United States v. Johnston*, 124 U. S. 236, 252.

These cases invite consideration of another statute—section 285, Revised Statutes—which provides—

"Every disbursement of public moneys, or disposal of public stores, made by a disbursing officer pursuant to an order of any commanding officer of the Navy, shall be allowed by the proper accounting officers of the Treasury, in the settlement of the accounts of the officer, upon satisfactory evidence of the making of such order, and of the payment of money or disposal of stores in conformity with it; and the commanding officer by whose order such disbursement or disposal was made, shall be held accountable for the same."

Under this provision two questions here arise: (1) Is the Secretary of the Navy a "commanding officer of the

Navy"; and (2) is the regulation—R-3991—an "order"; within the meaning of these words as used in the statute?

In the Jones case, *supra*, the trial judge answered the first question in the affirmative. (26 Fed. Cas. 648, No. 15493-a.) True, the case was decided in 1854 and before section 285 was enacted in its present form; but it involved practically identical language in a joint resolution of Congress of March 3, 1849. This strengthens the point; for Congress in reenacting the provisions of that resolution as section 285, adopted the judicial construction placed on the earlier enactment. Although the Supreme Court did not expressly affirm the reasoning of the circuit judge that reasoning must be deemed authority for the proposition it announces inasmuch as the Supreme Court did not think it necessary to notice or discuss the point. *Swaim v. United States*, 165 U. S. 553, 557, establishes this principle with a special emphasis because there was a reversal in that case.

The court in the Jones case—apparently apart from the statutory provisions of section 285, Revised Statutes—held that the accounting officers were bound to recognize as conclusive on them, an order of the Secretary of the Navy requiring a disbursement of public money.

Whether or not regulation R-3991 is an "order" and whether the Secretary is a "commanding officer of the Navy," the regulation is an order upon the pay officers of the Navy to pay money under certain contingencies, and as such, is conclusive on the accounting officers. A general order automatically operating whenever certain conditions arise, is as much an order as a special command reiterated on each particular occasion.

Section 285, Revised Statutes, has been supplemented by Navy Regulation 1299 (p. 318, N. R. 1909) as follows:

"When ordered by his commanding officer to make an expenditure of money or stores which the pay officer believes to be illegal or contrary to regulation, the latter shall state in writing the grounds on which he objects to obeying the order, and request that the order be reiterated in writing. On the receipt of such order the expenditure shall be made."

The Comptroller has held (8 Comp. Dec. 756) that to charge a commanding officer of the Navy with a payment made by his order under section 285, Revised Statutes, there must be a compliance with the above regulation (1299). Neither the regulation nor the ruling alters fundamentally the scope of section 285, Revised Statutes. The regulation has nothing to do with the position of the *paying* officer who has made an expenditure in accordance with such an order. The Comptroller's interpretation of that regulation relates merely to its operation on the *commanding* officer. The regulation presupposes a belief on the part of the paying officer that the expenditure is illegal or contrary to regulation. It provides for the very case in which, as was said above, regulation R-3991 would not operate; i. e., when the pay officer, from the face of the roll, can see that the disbursement is illegal. It even goes further and requires the pay officer to raise the question of legality whenever he has a belief that the payment would be irregular. It does not apply, however, to any case in which the pay officer, *in good faith*, renders his obedience to regulation R-3991.

In this connection, certain other Navy regulations and statutory provisions become significant. For example, article 1504, Navy Regulations of 1913, provides in its second paragraph—

"If any person under the Navy Department has knowledge of any fraud, collusion, or improper conduct * * * in any matters connected with the naval service, he shall report the same immediately, in writing over his proper signature, to his immediate superior, specifying the particular act or acts of misconduct, fraud, neglect, or collusion, and the means of proving the same."

while section 1624, Revised Statutes, article 8, provides—

"Such punishment as a court-martial may adjudge may be inflicted on any person in the Navy * * * who * * * refuses, or fails to use, his utmost exertions to detect, apprehend, and bring to punishment all offenders, or to aid all persons appointed for that purpose."

Thus there is ample provision to prevent a situation such as is suggested by the Comptroller, when he says that

the pay officer might deliberately make illegal payments, knowing them to be such, or knowing that the rolls when certified were, in fact, incorrect.

These latter considerations deal entirely with the practical aspects of the case; and even if they were lacking, the legal propositions advanced herein would be none the less sound in principle, with the result that the regulation in question is not inconsistent with law; and that, as a valid order of the head of an executive department, it has binding force upon the accounting officers of the Government.

Respectfully,

T. W. GREGORY.

To the SECRETARY OF THE NAVY.

MILITARY MOVEMENT OF TROOPS.

The Navy Department can not enter into a contract for the military movement of troops without previously advertising for proposals as required by section 3709 of the Revised Statutes.

The Act to Regulate Commerce of February 4, 1887 (24 Stat. 379), does not forbid a contract for the military movement of troops at less than tariff rates.

Neither sections 1 or 2 of the Sherman Anti-Trust Act of July 2, 1890 (26 Stat. 209), nor section 5 of the Act to Regulate Commerce of February 4, 1887 (24 Stat. 380), prevents the Navy Department from agreeing with many railroads, or prevents such railroads from agreeing among themselves, that a common agent of the roads may for a definite period direct the routing of Federal troops.

Whether the proposed agreement would be contrary to public policy as judicially construed and whether such agreement, if entered into, could be enforced by the courts, are questions which can not be answered because they are too general, and the second question can not be answered for the further reason that it involves a speculation as to future judicial action.

It is not believed that the proposed contract, if made, would embarrass the Department of Justice in the prosecution of railroads for pooling contracts.

DEPARTMENT OF JUSTICE,

June 1, 1915.

SIR: I have the honor to acknowledge receipt of your letter of April 8, 1915, wherein you request my opinion on

certain questions arising in the administration of your department in connection with a proposed contract for general military movement of troops, dated November 30, 1914, between a "Military Committee" (representing all lines, members of the Southwestern, Western, and Transcontinental Passenger Associations), on the one hand, and each, the War and Navy Departments, the Marine Corps, and the Quartermaster Department of the United States, on the other hand.

I consider these questions in their order.

I.

May the Navy Department lawfully contract to discontinue, for any period, the advertising for bids under section 3709, R. S., in connection with the movement of troops?

This question I answer in the negative, for these reasons: Section 3709 reads:

"All purchases and contracts for supplies or services, in any of the Departments of the Government, except for personal services, shall be made by *advertising* a sufficient time previously for proposals respecting the same, when the public exigencies do not require the immediate delivery of the articles, or performance of the service."

A contract for transportation is one for "supplies or services" within the meaning of this statute. Indeed the Navy Department in actual practice has treated the statute as applicable to such contracts, at least in time of peace.

Assuming the statute to be applicable, a contract such as you describe would be in effect a covenant not to discharge a duty imposed by law, and as such would itself be unlawful and void. Nor would this conclusion be affected by the casual fact—if it be a fact—that under present conditions advertisement would probably produce either no bid at all, or only one from a single source.

I also suggest that the practice prevailing the past 10 years in the Navy Department of sending letters soliciting proposals to individual carriers can not be regarded as in any sense a compliance with the requirement of this statute.

II.

Does the Act to Regulate Commerce (24 Stat. 379) forbid a contract for the military movement of troops, at less than tariff rates?

I answer this question also in the negative, for these reasons:

Section 2 of the act forbids a greater or less service charge "in the transportation of passengers or property" than is collected from any other person for *like services under substantially similar circumstances and conditions*; while section 3 forbids *undue or unreasonable preference* to any person in respect to any particular description of traffic.

Neither these sections nor the act itself otherwise was aimed at the regulation of *rates* for the movement of *military* traffic. No other traffic moves "under substantially similar circumstances and conditions." It may require special equipment, loading facilities, schedules, and even indefinite detention of the equipment itself. Nor could any rate make this traffic produce the harm to any of the public served by carriers that this act was meant to prevent.

Section 22, as amended March 2, 1889 (25 Stat. 862), and February 8, 1895 (28 Stat. 643) provides:

"* * * That nothing in this Act shall prevent the carriage, storage, or handling of property free or at reduced rates for the United States."

It is suggested that the limitation to "property" in this proviso operates to leave the movement of troops subject to the influence of sections 2 and 3, *supra*. I can not so read it. The United States has much transportable property besides its military stores; as, for example, material used in reclamation projects, Indian supplies, etc.; and the above proviso operates to preserve free or reduced rate carriage for property that might otherwise be within the operation of the act.

The Interstate Commerce Commission has so construed the act. Its conference ruling No. 218 reads:

"Rule 218. Carriers, either by contract or bid, or other arrangement with the War Department, may lawfully

make special rates or fares for the movement of federal troops, when moved under orders and at the expense of the United States Government, and that the rates or fares so made need not be posted or filed with the Commission." (P. 68, Conf. Rul. of Apr. 1, 1913.)

This ruling is limited to movements at the expense of the United States (Rule No. 297, p. 96), while rule 208-D (p. 61) forbidding free or reduced fare to any "officer of the Government, the army or the navy, or member of their families" does not extend to transportation while on service for the Government and at its expense.

Rulings Nos. 107 (p. 32) and 431 (p. 8, of Conf. Rul. of June 1, 1914) in forbidding special fares respectively for deported Chinese and for Federal convicts, even when moved at Government expense, accentuate the distinction here urged between military and nonmilitary Government traffic. And Ruling No. 33 (p. 11, Rulings of 1913, *supra*) and No. 208-E (ib. p. 62) dispense with tariffs whenever reduced rates are allowed the Government.

The reamendment of section 6 enacted August 24, 1912, (37 Stat. 568), and reading "* * * in time of war or threatened war preference and precedence shall, upon the demand of the President of the United States, be given, over all other traffic, to the transportation of troops and materials of war, and carriers shall adopt every means within their control to facilitate and expedite the military traffic" (34 Stat. 587), recognizes that what would as between different kinds of commercial traffic be plain discrimination can not so be regarded as between commercial traffic generally on the one hand the military traffic on the other.

III.

Your third and fourth inquiries can be considered together and may be stated in a single question thus:

Do sections 1 or 2 of the Sherman Anti-Trust Act, or section 5 of the Act to Regulate Commerce, prevent the Navy Department from agreeing with many railroads, or prevent such railroads from agreeing among themselves, that a common agent of the road may for a definite period, direct the routing of Federal troops?

I do not think that the Government may so agree with persons themselves prohibited by law from so doing—and this because such a contract, for lack of necessary joint legal assent, would be void as to both. *L. & N. R. R. v. Kentucky*, 161 U. S. 677, 692. Nevertheless, I answer this question in the negative, and for these reasons:

Section 5 of the Act to Regulate Commerce, *supra*, provides:

"That it shall be unlawful for any common carrier * * * to enter into any * * * agreement * * * with any other * * * common carriers, for the pooling of *freights* of different and competing railroads, or to divide between them the aggregate or net proceeds of the *earnings* of such railroads, or any portion thereof; etc."

Having already concluded that rates for troops are not within the purview of the act, it follows that this section can not reach an agreement limited to such movement. Even were the act of broader purpose, it is questionable whether the section could apply since its first clause is limited to "freights" and its second to "earnings" only. *Immigration Cases*, 10 I. C. C. Rep. 13. Here it may be noted that the question asked is much broader than the provision in that regard of the contract submitted. The latter provides:

"(a) The routing of the business to be left *in the hands of the authorized officers* of the U. S. Army, U. S. Navy and U. S. Marine Corps, from starting point to final destination, *in the understanding that* within the territory west of and including Chicago, St. Louis and the Mississippi River, *the traffic shall be equitably apportioned* according to the routings that may be specified by E. L. Bovington, chairman of the committee."

This provision might well be read as empowering the Government officers themselves to equitably apportion from time to time particular movements, selecting the route therefor from the various routes previously indicated by Chairman Bovington as available for any movement between those points. Thus read, and with each road retaining the earnings for its particular service as ren-

dered—and there is no suggestion in the contract that this will not be done—it would seem free from objection even if it dealt only with a kind of traffic within the purview of the act.

The Sherman Anti-Trust Act (26 Stat. 209) provides:

“SECTION 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal, etc.

“SEC. 2. Every person who shall monopolize, or attempt to monopolize * * * any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty, etc.”

Though for reasons already pointed out this contract may be given a harmless reading in respect to this act also, it may be conceded for argument's sake that if the subject matter of the agreement were ordinary trade or commerce it might involve an unlawful apportionment of business. *United States v. Trans-Mississippi Freight Ass'n*, 166 U. S. 290, 302, 303, 332, 333, 341, 342; Greenhood on Public Policy, 660, 664; Hadley's Railroad Transportation, 74, 76; Adam's Railroads, 180; Dabney's Public Regulation of Railways, 144; Nimo's Railroad Problems, 14; Peabody's Transportation Theories, 220. Nevertheless I can not regard the military movement of troops as “trade or commerce” or a contract therefor as one that may be “in restraint of” or to “monopolize * * * trade or commerce” within the meaning of the Sherman Act. It is hard to see how anyone selling transportation could build up a monopoly or restrain the trade of others in the movement of Federal troops, or how anyone could suffer by any action taken under this contract. It does not appear to be within the mischief at which the act was aimed. *Standard Oil Co. v. United States*, 221 U. S. 1; *United States v. American Tobacco Co.*, 221 U. S. 106.

To guard against a claim that the contract would be void as interfering with the “war power,” it might be well to insert at the end of the routing paragraph, “(a)” *supra*, a proviso that the apportionment clause should not apply in time of war, or threat of war, or other public emergencies.

IV.

Your fifth and sixth questions are, in substance—

Would the proposed agreement be contrary to public policy as judicially construed? And could the proposed agreement, if entered into, be enforced in the courts?

Neither of these questions may be answered because (a) they are too *general*. They relate to a single-spaced nine-page typewritten agreement without specifying any clause, sentence, or paragraph toward which the inquiry is directed. And (b) the second inquiry involves a speculation as to future judicial action—a matter on which my predecessors have steadily refused to express themselves.

V.

Your seventh question is:

Would the proposed contract, if made, embarrass the Department of Justice in the prosecution of railroads for pooling contracts?

This Department does not so believe.

Respectfully,

T. W. GREGORY.

TO THE SECRETARY OF THE NAVY.

PUBLIC LANDS IN ALASKA—RIGHTS OF WAY.

Revocable licenses under the act of February 15, 1901 (31 Stat. 790), or easements under the act of March 4, 1911 (36 Stat. 1253), may be granted for the development and transmission of electric power upon public lands situate in Alaska.

DEPARTMENT OF JUSTICE,

June 29, 1915.

SIR: You have asked me to advise you whether in my opinion it will be lawful for you to grant revocable licenses under the act of February 15, 1901 (31 Stat. 790), or easements under the act of March 4, 1911 (36 Stat. 1253), for the development and transmission of electric power upon public lands situate in Alaska.

The act of 1901 provides for the issuance of revocable permits for "the use of rights of way through the public lands, forest and other reservations of the United States," and certain national parks in California. The act of 1911 provides for the granting of easements, of limited terms, "for rights of way * * * over, across, and upon the public lands, national forests, and reservations of the United States." There is nothing in either of these acts indicative of an intention to restrict its operation geographically, but neither is made applicable, by its own terms or by any other act of Congress, to the Alaska lands by mention.

Section 1891 of the Revised Statutes declares:

"The Constitution and all laws of the United States which are not locally inapplicable shall have the same force and effect within all the organized Territories, and in every Territory hereafter organized as elsewhere within the United States."

Since the approval of the "Act providing a civil government for Alaska," May 17, 1884 (23 Stat. 24), Alaska has been an organized Territory. (*Steamer Coquiltam v. United States*, 163 U. S. 346, 352; *Binns v. United States*, 194 U. S. 486, 491), and, generally speaking, the laws of the United States have extended there not only by virtue of that section of the Revised Statutes, but also by virtue of an express provision in the act of 1884 itself declaring that:

"The laws of the United States, not locally inapplicable to said district and not inconsistent with the provisions of this act are hereby extended thereto." (23 Stat. 27, sec. 9.)

But this same organic act of 1884, after expressly extending to Alaska "the laws of the United States relating to mining claims, and the rights incident thereto," provided that:

"Nothing contained in this act shall be construed to put in force in said district the general land laws of the United States." (*Id.*, sec. 8.)

Hence in the mining regulations for Alaska, of July 28, 1885, prescribed under authority of that act by the Secretary of the Interior, with the approval of the President, it

was stated that "no public lands other than specific mineral claims are subject to survey or disposal in said district." 4 L. D. 128. Consistently, in the case of *William R. Weeks*, 25 L. D. 290 (decided in September, 1897), it was held by Secretary Bliss that the general railway right of way act of March 3, 1875 (18 Stat. 482), was inapplicable to Alaska. In the opinion it was said:

"The right of way act of March 3, 1875, is a part of the general land laws of the United States, the operation of which has never been extended to the District of Alaska, and it is clear from the portion of the 8th section of the act of 1884, before quoted, it was the intention of Congress that no other means of acquiring a right to use or occupy the lands within the District of Alaska should be construed to apply than those specifically named."

In the case of the *Miocene Ditch Company*, 35 L. D. 297, decided by Secretary Hitchcock in November, 1906, your Department was confronted with the question whether sections 18 to 21 of the act of March 3, 1891 (26 Stat. 1095), offering rights of way "through the public lands and reservations of the United States" for canals, etc., was in force in Alaska. On behalf of the company it was contended that, as those sections had been uniformly held applicable in the other Territories as well as in the States, and as Alaska had undoubtedly come to be a Territory of the United States (citing the *Steamer Coquitlam* case, *supra*), they must be applicable here. But your predecessor, after referring to the provision in the act of May 17, 1884, which I have quoted above, and which negatived any purpose in that act to extend to Alaska the general land laws in existence at its date, and after noticing that in certain other sections (11 to 14) of the act before him there were provisions expressly extending the townsite laws, and granting lands for trade and manufacture, in Alaska, rejected the company's contention.

"This legislation," said he (referring to sections 18 to 21 of the act of 1891), "has general application to the public lands of the United States but was not specifically extended to the lands in the district of Alaska, and while it may be conceded that the lands in the district of Alaska

are a part of the public lands of the United States, generally speaking, it seems clear from the special legislation with regard to the lands in said district, enacted prior to the passage of the act of 1891, the portion included in the sections of the act of 1891, before referred to, as well as the subsequent legislation found in the act of May 14, 1898 (30 Stat. 409), extending the homestead laws and providing for rights of way for railroads in the district of Alaska, that the lands within said district were not intended to be included within the general legislation found in sections 18 to 21, inclusive, of the act before referred to." (p. 298.)

In the elaborate act of June 6, 1900 (31 Stat. 321, ch. 786), entitled "An act making further provision for a civil government for Alaska, and for other purposes," it was once more provided that "the laws of the United States relating to mining claims, mineral locations, and rights incident thereto are hereby extended to the District," but again it was declared that "nothing contained in this act shall be construed to put in force in the district the general land laws of the United States." (*Id.*, secs. 26 and 27.)

This reiteration of the language of the act of 1884 reflects light upon the original purpose, and, when considered with the course of decision in your Department (which must have been known to Congress), and the legislative habit of dealing with the Alaskan lands through specific statutes, it is most persuasive evidence of a policy to withhold that territory from the reach of the land laws in general.

This, however, was a policy which Congress might well be expected to modify or abandon with changing conditions, and I am of the opinion that it was materially altered by the act of August 24, 1912 (37 Stat. 512). In this, the last of the acts adopted for the organization of the Territory, it is provided (sec. 3):

"That the Constitution of the United States, and all the laws thereof which are not locally inapplicable, shall have the same force and effect within the said Territory as elsewhere in the United States."

The express exception of the public-land laws, found in the earlier organic acts, is here omitted; *all* the laws of the United States are to operate in Alaska save only such as may be locally inapplicable. Is there any satisfactory reason for saying that the acts of 1901 and 1911 are "locally inapplicable"?

Alaska is now a Territory completely organized, and incorporated into the United States. *Rasmussen v. United States*, 197 U. S. 516. The executive and judicial branches of its government were provided by the acts of May 17, 1884, and June 6, 1900, *supra*. By the act of May 7, 1906 (34 Stat. 169), it was allowed a Delegate in Congress. The act of August 24, 1912, *supra*, added the legislature, and thus perfected the local government after the model adopted for so many of the other Territories which have passed into statehood. The character and objects of this local autonomy are essentially the same as theirs. The Territory has been divided into several land districts, each with its register and receiver clothed with the powers usual to such officials in other places. It has likewise its surveyor general. The system of public-land surveys has been expressly extended over it (Mar. 3, 1899, 30 Stat. 1098), and a large number of the public-land laws (generally in modified form) have been specifically set in force there. These include the mining laws, expressly extended by each of the two acts providing for a civil government, of May 17, 1884, and June 6, 1900, respectively; the town-site laws by the act of March 3, 1891 (26 Stat. 1099); the coal-land laws by the act of June 6, 1900 (31 Stat. 321, and later enactments); and the homestead laws, with some special provisions, by the acts of May 14, 1898 (30 Stat. 409), and March 3, 1903 (32 Stat. 1028). In the act of May 14, 1898, we find also provisions for the granting of rights of way for railways similar to the provisions to the general act of March 3, 1875 (18 Stat. 482). There are, besides, a number of other statutes, which need not be specifically mentioned, providing for the disposition or use of public lands in Alaska.

If the acts of 1901 and 1911 were inconsistent with any of this special legislation, they would be, in a proper sense,

"locally inapplicable." But there is no such inconsistency. The fields which they cover are distinct and not otherwise occupied, so far as Alaska is concerned. If then these two laws are "locally inapplicable" it can only be because the general land laws as a class are "locally inapplicable."

In *Stark v. Starrs*, 6 Wall. 402, it was held that a provision in the act of August 14, 1848, organizing the Territory of Oregon, which declared that all laws of the United States should be in force there, "so far as the same, or any provision thereof may be applicable," did not extend over the country either the general preemption law of September 4, 1841 (5 Stat. 455, sec. 10), or the allied town-site law of May 23, 1844 (5 Stat. 657). A number of other opinions to the same effect and based on like reasoning, are collected on the margin.¹ *Stark v. Starrs* involved a collision between claims to the same land under the town site and Oregon donation laws of September 27, 1850 (9 Stat. 496), respectively. Both the town-site law and the preemption law, to which it was deemed supplementary, were held inapplicable because "both acts limit the right of entry to surveyed lands," and, said the court:

"It is not pretended that any public surveys had been established over Oregon previous to the act of 1850, or were ever authorized by the Government. There were, therefore, no surveyed lands of which any entry could be made either by an individual or any corporate authorities. The laws of Congress relating to preemption by individuals or entries by municipal authorities had, therefore, no application to the condition of things in Oregon at that time." (*Id.*, 6 Wall. 414.)

Another reason was found in the fact that Oregon had been so largely settled before the creation of the territorial government, and many claims to land had arisen which

¹ *Marlin v. T'Vault*, 1 Oreg. 77.

Lonsdale v. Portland, Id., 381; 390; s. c., *Deady*, 1.

Whitlow v. Reese, 4 Oreg. 385.

Lamb v. Davenport, 1 Sawyer, 609.

Lonsdale v. Parrish, 21 How. 290, 298.

Missionary Society v. Dalles, 107 U. S. 336, 344.

Shively v. Bowlby, 152 U. S. 1, 51,

and cases cited.

were recognized by the settlers' rules of government, and subsequently, by the donation act of 1850, but which would have been incompatible with the extension to that country of the acts in question at the date of the organic act.

The opinion in *Stark v. Starrs* refers also to the act of September 28, 1850 (9 Stat. 521), which extended the laws of the United States "not locally inapplicable," to the State of California, and the writer, Mr. Justice Field, observes (p. 416):

"Yet it was never supposed that this provision had the effect of extending over the State any portion of the land system of the United States *in advance of the public surveys*, upon which that system rested, and without which, as the law then stood, that system was inoperative."

And he points out that Congress provided by special acts for the public surveys, and the extension of the pre-emption and town-site laws in California, and likewise in the Territories of New Mexico, Kansas, and Nebraska.

It will be seen at once that the reasons for this decision are wholly lacking in the case before me. There are no peculiar conditions in Alaska which would render it unjust or unwise to extend the right-of-way acts of 1901 and 1911 to that region; on the contrary, the probability is that their extension there would prove distinctly beneficial. Both acts apply to unsurveyed as well as surveyed lands; and, besides, the system of public surveys was extended to Alaska before the act of 1912 was passed. I do not look upon *Stark v. Starrs* as authority for the broad proposition that all the land laws must be regarded as locally inapplicable in a new territory until they have been extended there expressly, nor am I aware of any other decision to that effect.

As was said in *Hornbuckle v. Toombs*, 18 Wall. 648, 655, it is the "laws of a general character and universal application; but not those of specific application," which are imported into the new Territory as not locally inapplicable. The purpose of the declaration contained in section 1891 of the Revised Statutes, and the like declarations which, for so many years, have customarily been inserted in the acts organizing Territories and the enabling acts authorizing the

creation of States, is to insure the immersion of the newly organized unit of government into the existing mass of Federal Legislation in a degree consistent with the status acquired through incorporation into the United States. In becoming thus closely related to the Union the new Territory is brought so well within the focus of the ordinary activities of Congress that special mention will not be needed to include it within the operation of future laws of a general character and dealing with subjects found within its limits. So, all similar laws existing, which are of continuing operation, should be extended to the new locality, in order that a region which has become absorbed, so to speak, into the national body politic, may be governed, in common with the rest of the country, by one uniform and coherent system, in so far as this may consist with the peculiarities of local conditions and the persistence of all those special regulations which must be held to have survived the change. The tests used in ascertaining whether an old law has been extended must be closely analogous to those used to determine whether a new law applies. If either the old or the new is couched in general terms, calculated to operate everywhere in the United States where the subject matter exists, both should be allowed to operate accordingly, due regard being paid, however, to the protection of other acts *in pari materia* and to the doctrine laid down in *Stark v. Starrs*, *supra*, that conditions extrinsic to legislation as well as conditions legislative may render an old law "locally inapplicable" to the new place.

"While a statute is presumed to speak from the time of its enactment, it embraces all such persons or things as subsequently fall within its scope, and ceases to apply to such as thereafter fall without its scope. Thus, a statute forbidding the sale of liquors to minors applies not only to minors in existence at the time the statute was enacted, but to all who are subsequently born; and ceases to apply to such as thereafter reach their majority. So, when the Constitution of the United States declares in Art. I, sec. 10, that the States shall not do certain things, this declaration operates not only upon the thirteen original States, but upon all who subsequently become such; and when

Congress places certain restrictions upon the powers of a territorial legislature, such restrictions cease to operate the moment such Territory is admitted as a State. By parity of reasoning a country ceases to be foreign the instant it becomes domestic." (*De Lima v. Bidwell*, 182 U. S. 1, 197.)

Your Department in the case of *Alaska Treadwell Gold Mining Company*, 40 L. D. 426, held, in effect, that the forest reservations in Alaska fell within the scope of the act of 1901, because those reservations, created by the President and recognized by Congress, must be regarded as the same in character and incidents as the forest reservations of the country in general, to which that act in terms applies. In like manner the "public lands" of Alaska must be held to have fallen within the scope of the act of 1901, and the act of 1911 also, if their general status is essentially the same as that of the "public lands" to which those acts refer. The term "public lands" as there used means any lands of the United States which are not held for public uses, set aside for special purposes, or affected by private rights, but which are open to private acquisition under the general public land system. (*Newhall v. Sanger*, 92 U. S. 761; *Bardon v. Northern Pacific*, 145 U. S. 535.) The public lands of Alaska satisfy this definition. Congress, before the act of 1912, had opened them to general disposition through the same mechanism and, largely, in the same ways, as had been provided for the rest of the United States. The same surveying system had been established there, the same system of land offices and land districts, the same direct and supervisory jurisdiction in your Department. The general mining law was there with all its incidents, and the homestead, townsite, coal land, and other general dispositive laws to which I have called attention above. I would notice also that Congress, as long ago as 1898, declared that the tide lands of Alaska and the beds of its navigable waters and the right to regulate the use and control the possession of such lands "shall continue to be held by the United States in trust for the people of any State or States which may hereafter be erected out of said Dis-

trict" (30 Stat. 409, sec. 2), and that very recently the usual reservation of lands for educational purposes was made for the benefit of Alaska (Mar. 4, 1915, 38 Stat. 1214, ch. 181). True, some of the land laws were withheld entirely, others were extended with modifications, and still other provisions, entirely new, were adopted for Alaska alone. But the facts that the lands in a given State or Territory are not subject to acquisition under some of the general laws which apply in other localities, and are subject to acquisition under other laws which do not apply in other localities, could not be allowed to remove them from the scope of a general statute granting privileges in "the public lands of the United States." Perfect geographical uniformity has never existed in the public land scheme; many of the general laws, like the mining law and the original timber and stone law and the reclamation laws (not to add further illustrations), have been geographically restricted by their own terms. Obviously it is not upon the number of the laws through which lands may be disposed of that their status as "public lands" depends, but rather upon the fact that they are submitted to private acquisition in accordance with the policy which this country has adopted of disposing of its public domain through general rules.

Of course, Congress, for disposing of the lands in Alaska, might have adopted a plan so peculiar and distinct as to manifest an abiding policy to deal with them apart; and in that event the public lands in Alaska would not be "public lands" in the sense of any of the general land laws, and those laws would be "locally inapplicable," because their subject matter would be wholly absent from the Territory. But Congress did not do this. On the contrary, the policy has been to treat these lands as part of the common mass, and to include them gradually in the general scheme of disposition, with such special modifications and restrictions as seemed to be called for by peculiar local conditions. The remoteness of Alaska, the tardy growth of its population and industries, and the slow upbuilding of the Territorial government, are enough to explain the cautious progress of the land laws, without assigning rea-

sons opposed to the general trend of what was actually done.

Before the local government was perfected, Congress thought it necessary to withhold the general land laws by express declaration. This was consistent with a purpose to extend them ultimately and a belief that the purpose would be anticipated if the declaration were omitted. With the perfection of the local government, Congress significantly omits this declaration, while proclaiming anew that all the laws of the United States, not locally inapplicable, shall extend over the Territory. It is possible that this omission may have resulted from an oversight, but I do not feel at liberty to consider it so lightly. I regard it as an omission which very logically and very properly might be expected in an organic act by which, for the first time, the people of Alaska were placed upon a parity with the people who inhabited the other Territories in the United States, and were trusted with a voice in the wielding of their own affairs. It is quite natural, I think, that Congress, in fully organizing this Territory and in thus conceding the importance and capacity of its population, should wish to offer to its citizens the same opportunity and the same incentive to develop and thrive upon the resources about them as have been accorded in all similar cases.

I answer your question, therefore, by saying that the acts of 1901 and 1911 are applicable to the public lands in Alaska. It is hardly necessary for me to add that my finding is confined to those laws. How far the other general laws which Congress has not expressly extended to the Territory may operate consistently with the special legislation and the local conditions can only be determined in each case as it arises.

Very respectfully,

T. W. GREGORY.

To the SECRETARY OF THE INTERIOR.

JACKSON LAKE DAM—TIMBER FROM NATIONAL FOREST.

Under the act of February 21, 1911, authorizing the Reclamation Service to cooperate with private parties in carrying out projects under the Carey Act, the Kuhn Irrigation & Canal Co. may be permitted to take timber from the Teton National Forest free of charge for use in raising the dam at Jackson Lake, Wyo., which is a project authorized under the reclamation act of June 17, 1902. The Reclamation Service is not entitled to the receipts from sales of timber from lands withdrawn from public entry that the Forest Service may make to private parties for general commercial purposes.

DEPARTMENT OF JUSTICE,

July 3, 1915. .

SIR: You have requested my opinion upon the following questions which have arisen in the administration of the Teton National Forest in Wyoming:

"(1) Whether under the provisions of the act of February 21, 1911 (36 Stat. 925), authorizing the Reclamation Service to cooperate with private parties in carrying out projects under the Carey Act (28 Stat. 422), the Kuhn Irrigation and Canal Company, engaged upon such a project, is entitled to timber from that forest free of charge for use in raising the height of the dam at Jackson Lake, Wyo., which is a part of the Minidoka project, constructed by the Reclamation Service under the National Irrigation Act of June 17, 1902 (32 Stat. 388), the timber to be taken from land withdrawn under the last named act for use in the construction of works authorized by that act; and

"(2) Whether the Reclamation Service is entitled to the receipts from any sales of timber from land so withdrawn that the Forest Service of the Department of Agriculture may make to private parties for general commercial purposes."

1. The national irrigation act of June 17, 1902 (32 Stat. 388) creates the "reclamation fund" out of moneys derived from the sale of public lands in certain States and Territories, to be used for all expenditures sanctioned by the act (sec. 1), and authorizes the Secretary of the Interior to locate and construct irrigation works (sec. 2), and to contract for their construction (sec. 4).

The act of February 8, 1905 (33 Stat. 706), provides:

"That in carrying out the provisions of the national irrigation law, approved June seventeenth, nineteen hundred and two, and in constructing works thereunder, the Secretary of the Interior is hereby authorized to use and to permit the use by those engaged in the construction of works under said law, under rules and regulations to be prescribed by him, such earth, stone, and timber from the public lands of the United States as may be required in the construction of such works, and the Secretary of Agriculture is hereby authorized to permit the use of earth, stone, and timber from the forest reserves of the United States for the same purpose, under rules and regulations to be prescribed by him."

It can hardly be said that the Secretary of the Interior, in constructing irrigation works for the Government with authority "to use" timber from the public lands, must pay for such timber; yet his authority "to use" is given in the same terms, by the same sentence, and for the accomplishment of the same object as is his authority and the authority of the Secretary of Agriculture to "permit the use." The act of March 3, 1891 (26 Stat. 1095, 1101), grants rights of way to canal and ditch companies through "the public lands and reservations," and "also the right to take, from the public lands adjacent to the line of the canal or ditch, material, earth, and stone necessary for the construction of such canal or ditch." It would be absurd to impute to Congress an intention to require payment for material used in the construction of irrigation works for the Government when it had granted the right to take such material for the construction of similar works in private ownership.

These considerations point to the conclusion that the words "to use" and "to permit the use" as employed in the act of February 8, 1905, should be taken to mean the use and permission to use timber on the public lands and forest reserves free of charge.

This use of timber is authorized "in carrying out the provisions of the national irrigation law, approved June 17, 1902, and in constructing works thereunder." The

dam at Jackson Lake, Wyo., was constructed as a part of the Minidoka irrigation project by the Reclamation Service under that act. In order to provide water for the Kuhn Irrigation & Canal Co. in carrying out its project under the act of August 18, 1894 (28 Stat. 422), known as the Carey Act, the Reclamation Service contracted with that company to raise the Jackson Lake dam. The raising of the dam by contract is a construction of irrigation works authorized by section 4 of the national irrigation act. The Carey Act provided for the grant of desert lands of the United States in the States under regulations requiring approval by the Secretary of the Interior of projects for their reclamation. The project in question is one of that character. Conceding that the land to be served by this project is not public land, yet the national irrigation act of 1902 (secs. 4 and 5) expressly contemplates the construction of works for the irrigation of "land in private ownership" as well as public land. The act of February 21, 1911 (36 Stat. 925), amendatory of the act of 1902, provides for the disposal of the excess waters of Government reclamation projects to other systems, to be used as prescribed by law as to lands held in private ownership within the Government projects; and authorizes Government cooperation by agreement with other systems for the construction of irrigation works, the title to and management of which shall remain in the Government until otherwise provided by Congress.

Additional works constructed under these provisions and for these purposes are national irrigation works, within the meaning of the act of February 8, 1905, as clearly as are works constructed under the original Government project. It follows that, in the construction of such additional works, the use of timber from the public lands and forest reserves may be permitted free of charge.

2. In the execution of the Minidoka reclamation project the Secretary of the Interior made various withdrawals of land within the limits of the Teton National Forest. The national irrigation act (32 Stat. 388) does not specifically authorize the Secretary to use national forest lands. But it does authorize him to "withdraw from public entry the

lands required for any irrigation works" (sec. 3), and to "perform any and all acts * * * necessary and proper for the purpose of carrying the provisions of this Act into full force and effect" (sec. 10).

For the purposes of creating, maintaining, and operating reclamation works, this authority has been held to extend, by implication, to the designation and appropriation of lands previously reserved for the Indians (*Henkel v. United States*, 237 U. S. 43), and, for the reasons assigned by the Supreme Court in that case, I am satisfied that the same conclusion must be drawn in respect of lands appertaining to the national forests. A designation of such lands by the Secretary of the Interior for immediate or prospective reclamation uses of the character I have mentioned would withdraw them from the operation of the general laws which look to the acquisition of private rights or privileges within national forests, just as a similar designation of public lands would withdraw them from the operation of the laws permitting rights or privileges to be obtained in the vacant unappropriated public domain. In neither case should the private acquisition or use of any part of the withdrawn area be allowed without the consent of the Secretary of the Interior. In other words, nothing should there be done or permitted which, in his judgment, may be inconsistent with the objects of the withdrawal.

It does not follow, however, that lands may be eliminated from a national forest by a reclamation withdrawal. Preliminary withdrawals of that kind often, through caution or necessity, exceed the areas ultimately required for the creation, operation, and protection of the works in view; and sometimes, no doubt, they are made in contemplation of projects which afterwards are abandoned. Whenever it becomes apparent that a withdrawal is in whole or in part unnecessary, it should be modified or revoked, so that the lands not needed for the reclamation use may be set free from the special reservation which the withdrawal implies. The national irrigation act (sec. 3) directs the Secretary of the Interior to "restore to public entry" any lands which he has withdrawn "from public

entry," when, in his judgment, they are no longer required for the purposes of the act. The words speak directly of the public lands, and therefore are not literally applicable to national forest lands, which are not open to "public entry" in the ordinary sense; but the evident purpose is to bring about a restoration of the *status quo ante*. This means, of course, that where lands of a national forest have been tentatively appropriated for the reclamation use, and the appropriation is later found to be unnecessary, they shall thenceforth be relieved of that appropriation, resuming in full the condition which, for a time, was modified thereby.

In the meantime, subject to the necessities of the reclamation use, they should be administered as national forest lands. Timber may be sold, if there be no objection by the Secretary of the Interior, in the same manner as if the reclamation withdrawal had not occurred, and the moneys should be covered into the Treasury as a miscellaneous receipt like any other moneys accruing from the sale of timber from a national forest. (34 Stat. 1256, 1270.) I can find no warrant for adding such receipts to the reclamation fund or applying them to reclamation uses.

I therefore have the honor to inform you that, in my opinion, the second question should be answered in the negative.

Very respectfully,

T. W. GREGORY.

To the SECRETARY OF AGRICULTURE.

ALASKAN RAILROAD—COMPENSATION FOR ACCIDENTS.

It was within the power conferred upon the President by the act of March 12, 1914 (38 Stat. 305), authorizing the construction of railroads in Alaska, to issue the Executive order of April 10, 1915, directing the Secretary of the Interior to prepare and adopt a system of compensation for accidents to persons engaged in the work of construction of the proposed railroad in Alaska.

The Secretary of the Interior having prepared such system in conformity to the Executive order of April 10, 1915, it is within his authority to put it into effect.

DEPARTMENT OF JUSTICE,

July 3, 1915.

SIR: I have the honor to acknowledge the receipt of your letter of April 27, 1915, in which you request my opinion upon the following question:

You state that under the act of March 12, 1914 (38 Stat. 305), entitled "An act to authorize the President of the United States to locate, construct, and operate railroads in the Territory of Alaska, and for other purposes," the President has, by Executive order, located a railroad to be built in Alaska, complying with the general conditions of said act; that he has by further Executive order dated April 10, 1915, placed the duty of carrying on this work on the Alaskan Engineering Commission, under your direction; that in said order of April 10, 1915, the President has directed as follows:

"I charge the commission particularly with the preparation and maintenance of such arrangements as may be required for the health of the men engaged in the work of construction, and I instruct you (the Secretary of the Interior) to prepare and adopt a proper system of compensation for accidents which may occur on the work, in general with the lines of the system now in force in the construction of the Isthmian Canal, but such system shall be so framed that its benefits will be applicable not only to those who are directly in the service of the commission upon salary, but also to those who may, by contract with the commission, be actually engaged in the work of construction in Alaska,"

that in accordance with said order you have prepared a system providing for compensation for accidents, a copy of which you inclose, and which you desire to put into effect.

You ask my opinion whether you have authority to put into effect such system.

The system which you have adopted provides that—

"Employees of the Alaskan Engineering Commission shall have the right to receive compensation for injuries sustained in the course of their employment while actually in the Territory of Alaska at the rates and in the amounts and on the conditions provided in the act entitled 'An

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act granting to certain employees of the United States the right to receive from it compensation for injuries sustained in the course of their employment' approved May 30, 1908." (35 Stat. 556.)

It further provides for free medical and surgical treatment for employees of the Alaskan Engineering Commission, as well as for persons who, under contract with the commission, are actually engaged in the work of construction of the Alaskan railways.

The main purpose of the act is the construction of a railroad in Alaska, under direction of the President, to connect one or more of the open Pacific Ocean harbors on the southern coast of Alaska with the navigable waters in the interior, and with the interior coal fields, so as to aid in the development of the internal agricultural and mineral resources, and the settlement of the public lands, and so as to provide transportation of coal for the Army and Navy, and for other governmental and public uses.

By further provisions of the act (38 Stat. 305, 307) the President is "empowered, authorized, and directed"—
"to employ such officers, agents, or agencies, in his discretion, as may be necessary to enable him to carry out the purposes of the act."

The act further provides:

"that it is the intent and purpose of Congress through this act to authorize and empower the President of the United States, and he is hereby fully authorized and empowered, through such officers, agents, or agencies as he may appoint or employ, to do all necessary acts and things in addition to those specially authorized in this act to enable him to accomplish the purposes and objects of this act."

This act gives to the President full control of the location and building of the proposed railroad, broad powers of Executive action, and wide discretion as to the means and agents to be utilized in fulfilling the purposes of the act. It was essential to the proper performance of a project of such large importance that he should not be hampered by legislation as to details, and Congress in the clearest language has evinced its intent to leave matters of detail to the President's own judgment.

Consequently, it lies with the President to determine the manner in which the railroad shall be most successfully constructed. As an incident to such construction, the President, by his Executive order of April 10, 1915, has determined that compensation for injuries sustained in the course of employment shall be made to two classes of persons:

“(a) Those directly in the service of the commission upon salary;

“(b) Those actually engaged in the work of construction in Alaska, by contract with the commission.”

The latter class will, of course, include persons employed in the actual work of construction, either on salary, as day laborers, or on special contract work, for in either case they will be employed “by contract with the commission.” The order appears to make no provision for persons who are employed by the commission otherwise than upon salary but *not* actually engaged in the work of construction in Alaska.

This order, in my opinion, was clearly within the range of the President's statutory authority. To hold otherwise would restrict unwarrantably that which Congress intended as a broad and untrammelled grant of power.

Risk of injury is a necessary incident to all employment. Under enlightened modern, social, and economic theory provision for compensation for all such injuries is a part of the duty of the State, either by State insurance or State-controlled employers' liability, since on broad grounds of policy it is for the interest of both employer and employee that the loss entailed by injury should not fall solely on the employee. Recognition of this policy is already to be found in governmental action at Panama, and in legislation enacted and pending in Congress, in the direction of employees' compensation.

The President may well deem it important to provide for humane, economic, and uniform conditions among persons in the Government service, whether working as salaried officers, day laborers, or under other contract. The system of compensation provided for by him in his Executive

order of April 10, 1915, is in accordance with such a view, and is, in my opinion, warranted by the authority conferred upon the President by the statute. This being so, the system being instituted by you was within your power, since it was within the limits prescribed by the Executive order of the President.

Respectfully,

T. W. GREGORY.

To the SECRETARY OF THE INTERIOR.

RETIREMENT OF ARMY AND NAVY OFFICERS SERVING ON
THE ISTHMUS OF PANAMA.

Under the act of March 4, 1915 (38 Stat. 1190), providing for recognizing the services of certain officers of the Army, Navy, and Public Health Service for their services in connection with the construction of the Panama Canal, when an officer otherwise within the purview of the act applies for retirement he *must* be retired, and the President has no discretionary authority to postpone the date of retirement to such time as he may deem proper.

DEPARTMENT OF JUSTICE,
July 7, 1915.

SIR: I have the honor to acknowledge receipt of your letter of May 11, 1915, in which you request my opinion upon the construction of the act approved March 4, 1915, (38 Stat. 1190), entitled:

"An act to provide for recognizing the services of certain officers of the Army, Navy, and Public Health Service for their services in connection with the construction of the Panama Canal, to extend to certain of such officers the thanks of Congress, and for other purposes."

Section 6 of which provides:

"That at any time after the passage of this act any officer of the Army or Navy to be benefited by the provisions of this act may, *on his own application*, be retired by the President at seventy-five per centum of the pay of the rank upon which he is retired."

My opinion is desired upon the following points:

(1) Does this act entitle an officer of the Army included within its terms to be retired immediately on his own application therefor? or;

(2) Has the President discretionary authority to postpone the date of retirement to such time as he may deem proper, but not later than required by other provisions of law for the retirement of officers of the Army?

The sections of the act, other than section 6, provide for the thanks of Congress to certain named officers; for advance in rank to the officers so named of from one to two grades; for advance in rank of one grade, upon retirement, of other officers who have had such service; for discretionary advance in rank of one grade to officers of the Public Health Service who have had such length of service; for advance in rank of one grade to officers who have had such service and have already been retired; and for other matters, not material here.

The question presented is whether the word "may," as used in section 6, quoted *supra*, gives an absolute right to retirement to the applying officer, regardless of other general provisions of the retirement laws, or whether it vests the President with discretionary power in the premises; in other words, whether the word "may," with relation to the duty of the President, is mandatory or permissive.

A review of previous Federal Statutes discloses the following practice of Congress in the use of the word "may" in connection with the subject of retirement of officers in the Army and Navy.

The early general retirement statute, with respect to commissioned officers of the Army (act of Aug. 3, 1861, 12 Stat. 287), provides (sec. 15):

"That any commissioned officer of the Army, or of the Marine Corps, who shall have served as such for forty consecutive years, *may, upon his own application* to the President of the United States, be placed upon the list of retired officers, with the pay and emoluments allowed by this act."

The act of July 15, 1870 (16 Stat. 315), which seems to have been the first act specifically vesting discretionary

power in the President in the matter of the retirement of officers, provided in sections 3 and 4, respectively:

"That the President be, and *he is hereby, authorized, at his discretion*, honorably to discharge from the service of the United States officers of the Army who may apply therefor on or before the first of January next; and such officers so discharged under the provisions of this act shall be entitled to receive, in addition to the pay and allowances due them at the date of their discharge, one year's pay and allowances.

"That the President be, and he is hereby, *authorized, at his discretion*, to place on the retired list of the Army, on their own application, any commissioned officers who have been thirty years in the service, and the officers who may be retired by virtue of this section shall be entitled to the same pay and emoluments as are now allowed, or may be hereafter allowed, to officers retired from active service."

The commissioners appointed to revise the statutes of the United States consolidated the provisions of the acts quoted above, and embodied the three sections, as shown by the side notes, into section 151, c. 2—"Of Retirement," Title XIV, "The Army"—(p. 615), as follows:

"When an officer has served forty consecutive years as a commissioned officer, he *shall*, if he makes application therefor to the President, be retired from active service and placed upon the retired list. When an officer has been thirty years in service *as a commissioned officer*, he *may*, upon his own application, *in the discretion of the President*, be so retired, and placed on the retired list."

An explanatory note follows this proposed section, in which the commissioners state:

"The words in italics ('as a commissioned officer') are supplied as within the meaning of the act of 1870. The provision as to thirty years in this act is deemed not to supersede that of 1861 as to forty years. Although the language of the latter act is '*may be placed on the retired list*,' it would seem that one act *gives a right to retirement*, while the other gives discretion to the President to retire on a shorter service."

This appears to have been the first use in retirement statutes of the word "may" coupled with the term "in the discretion of the President." The explanatory note clearly indicates that, in the opinion of the commissioners, that word, when employed as it was in section 15 of the first retirement act, i. e., in connection with length of service in the Army (40 years) meant "shall," and that when so used, unless accompanied by express words vesting discretion in the President, it was mandatory.

Evidently the word was used in the original act of 1861 for the purpose of granting a right or reward for long service in the Army (40 years), although the officer would not be entitled under other provisions of the act to retirement for physical disability incident to the service.

The same view must have been adopted by Durant in his redraft of the revision presented to Congress in 1873, since he made no change in the section, as presented by the commissioners. Congress must also have so understood and adopted it, as the section (with the exception of the words "as a commissioned officer" stricken out) was enacted by that body as section 1243, Revised Statutes, and is the law to-day.

Section 21 of the act of 1861 contains a provision with respect to the retirement of officers of the Navy similar to that of section 15 for officers of the Army. Section 21 was not materially changed by the commissioners or by Congress, and the original language found in section 15, and repeated in section 21, was substantially adopted in the incorporation of section 21 into the Revised Statutes as section 1443, viz:

"When any officer of the Navy has been forty years in the service of the United States he *may be retired from active service* by the President upon his own application."

Clearly, if the use of the word "may" in section 15 granted an absolute right to officers of the Army, the use of the same word in section 21 of the same statute, which is now existing law, in practically its original form, granted and grants the same absolute right to officers of the Navy.

This view of the proper construction of the word "may," when used without limiting words of discretion, is further strengthened by consideration of some of the other retirement statutes, passed since the adoption of the Revised Statutes.

The act of June 29, 1906 (34 Stat. 554), provides that certain officers under certain circumstances "may" in the discretion of the President be retired.

The act of June 22, 1910, as amended by the act of March 4, 1911 (36 Stat. 580, 1348), provides that officers of the Reserve Medical Corps, under certain conditions "may" be retired, "in the discretion of the President."

The act of May 13, 1908, provides that officers of the Navy after 30 years' service "may," upon their own application, be retired "in the discretion of the President."

No statute has been found, since the original retirement statute of the Army, enacted in 1861, in which the word "may" has been employed, unaccompanied by words specially conferring discretion upon the President, except the act of December 20, 1886 (24 Stat. 351), providing for the retirement of two certain named naval officers, which follows in form the original act of 1861, and section 8 of the Navy personnel act of 1899 (30 Stat. 1006) (in which latter the construction of the word is made sufficiently plain by the language of the succeeding section).

The legislative history of the particular statute is also informing.

It appears that the original bill was introduced in the House by Mr. Adamson on May 13, 1914, as House bill No. 16510, Sixty-third Congress, second session. The purposes to be accomplished by the bill were stated by Mr. Dent, in the absence of Mr. Adamson, in the House on September 8, 1914, as "simply to reward the builders of the Panama Canal for the extraordinary services that they have rendered to this country and to the world." (Cong. Rec., vol. 51, pp. 14822-14824.)

In the report of the Senate Committee (Senate Reports 929, 63d Cong., 3d sess.), after stating in general terms the purpose of the prior sections of the bill, it is said:

"A further provision would extend the privilege of retirement on application to any officer of the Army or Navy to be benefited by the bill."

It thus appears that the entire purpose of the bill, as shown by its title, was that of a reward "recognizing the services" of officers at Panama; that the provision as to retirement was stated in the committee's report to constitute a "privilege"; that all the other provisions of the bill are in the nature of rewards and privileges.

To construe the word "may," therefore, as merely granting to the President a right to retire an officer prior to the time when under previous statutes he could retire such officer would seem inconsistent with the general purposes of the act.

As was stated in *United States v. Thoman* (1895), 156 U. S. 353, 359:

"It is familiar doctrine that where a statute confers a power to be exercised for the benefit of the public or of a private person, the word 'may' is often treated as imposing a duty rather than conferring a discretion. *Mason v. Fearson*, 9 How. 248; *Washington v. Pratt*, 8 Wheat. 681; *Supervisors v. United States*, 4 Wall. 435. This rule of construction is, however, by no means invariable. Its application depends on the context of the statute, and on whether it is fairly to be presumed that it was the intention of the legislature to confer a discretionary power or to impose an imperative duty. *Minor v. Mechanics' Bank*, 1 Pet. 46; *Binney v. Chesapeake & Ohio Canal Co.*, 8 Pet. 201; *Thompson v. Carroll's Lessee*, 22 How. 422."

My answer to your question is, therefore, that when an officer otherwise within the purview of the act applies for retirement he *must* be retired, and the President has no discretionary authority to postpone the date of retirement to such time as he may deem proper.

Respectfully,

T. W. GREGORY.

To the SECRETARY OF WAR.

CITIZENSHIP OF MRS. BERRYMAN.

The enlistment of a citizen of the United States in the Canadian expeditionary force for the war in Europe, which required his taking a qualified oath of allegiance to Canada, does not forfeit his wife's American citizenship.

In such case the wife, who has resided in Canada since 1912, can not be barred from returning to the United States, the country of her nativity and citizenship.

DEPARTMENT OF JUSTICE,

July 28, 1915.

SIR: I have the honor to acknowledge receipt of your letter of June 21, 1915, in which you ask for my opinion upon the question presented by the following state of facts:

Samuel J. Berryman, a citizen of the United States, married in Canada, in 1912, his wife, Esther, who was a native citizen of this country, and they have continuously resided in Canada since that time, Berryman, however, making no attempt to become a naturalized citizen of Canada.

Recently the husband joined the Canadian expeditionary force for the war in Europe, taking the following oath of enlistment:

"I, * * * , do make oath, that I will be faithful and bear true allegiance to His Majesty, King George the Fifth, His Heirs and Successors, and that I will as in duty bound honestly and faithfully defend His Majesty, His Heirs and Successors, in Person, Crown, and Dignity, against all enemies, and will observe and obey all orders of His Majesty, His Heirs and Successors, and of all the Generals and Officers set over me. So help me God."

On May, 15, 1915, Mrs. Berryman, desiring to return to the United States, the country of her nativity and citizenship, was detained by the immigration inspectors, and after inquiry excluded by the special immigration board sitting at Montreal, upon the ground that the husband had expatriated himself, and that, her political status following his, she was an alien, liable to become a public charge and not entitled to readmission. The case has been appealed and the Department of Labor requests the

opinion of this Department, transmitting with its request the opinion of the Acting Solicitor of that Department, to the effect that the ruling of the special board was correct.

An excerpt from the testimony of Berryman at the hearing before the board of special inquiry at Montreal is embodied in the letter of the Acting Solicitor, viz:

"Q. Citizen or subject of what country?

"A. United States—that is, as I understand it, the military oath I took is good only for during the war and it does not constitute an oath of naturalization.

"Q. Do you admit, however, that you have taken the oath of allegiance to the British Crown?

"A. Yes sir: the military oath of allegiance.

"Q. Who gave you to understand that it does not forfeit your citizenship?

"A. The recruiting sergeant gave me to understand that it was a matter of merely for the duration of the war, because I asked him if I would have to take out naturalization papers afterward to become a citizen of Canada and he told me I would have to do so, and he said this oath was only good during the war."

The Canadian civil and military authorities have advised the United States commissioner of immigration at Montreal that the oath taken by Berryman confers no rights of citizenship in Canada or Great Britain.

The form of oath prescribed to aliens desiring to become naturalized citizens of Canada by the statute of 4, 5 Edward VII, ch. 25, of July 20, 1905, is as follows:

"Oath of Allegiance.

"I, A. B., formerly of (former place of residence to be stated here), in (country of origin to be stated here), and known there by the name of (name and surname of alien in his country of origin to be stated here), and now residing at (place of residence in Canada and occupation to be stated here), do sincerely promise and swear (or, being a person allowed by law to affirm in judicial cases, do affirm) that I will be faithful and bear true allegiance to His Majesty King Edward VII (or reigning

CITIZENSHIP OF MRS. BERRYMAN of the

The enlistment of a citizen of the United States in an expeditionary force for the war in Europe, and of the taking a qualified oath of allegiance to the Government, the utmost of his wife's American citizenship. Person, Crown, not be barred from returning to the most endeavor to of her nativity and citizenship.

His Heirs, or Successors, conspiracies and attempts to commit any of them; and, without any equivocation, reservation. So help me God.

SIR: I have the honor to acknowledge the receipt of your letter of June 21, 1907, upon the question proposed by you.

Samuel J. Berryman, at _____, this _____ day of _____, married in California, represented by you appear to involve two questions: a native citizen of the United States, who has resided for some time in the United States, and whether Berryman expatriated himself by taking an oath of enlistment.

Whether Berryman expatriated himself by taking an oath of enlistment. R. Berryman, if he has expatriated himself, and forfeited his United States citizenship, the status of his wife follows his, and whether she has forfeited her own citizenship in this country.

The right of an American citizen to voluntary expatriation has been a cardinal doctrine of the United States from the earliest days, and the act of July 27, 1868 (now R. S. sec. 1999), declared it to be "a natural and inherent right of all people."

Prior to the year 1907 there had been much discussion in the state papers of the United States, and in the opinions of the Attorneys General, with reference to the acts which should be held to effect expatriation (a comprehensive collection of which is to be found in Moore's International Law Digest, Vol. III, pp. 711-735). The exact delimitation of the modes of expatriation, however, had never received statutory enunciation. For many years, there had been much discussion as to whether limited and qualified oaths of allegiance to a foreign government taken by American citizens for the purpose of service in some civil or military capacity, but which did not qualify such

as citizens of the foreign country, would be sufficient to constitute an expatriation of such citizens or loss of American citizenship. It has been repeatedly held by the State Department that enlistment in the naval service of a foreign government did not constitute a renunciation of American citizenship. (Moore's International Law Dictionary, p. 101.) And see *United States v. Reading*, 159 U. S. 81, 16 S. Ct. 103, 41 L. ed. 103. It has also been held by the State Department that a limited and qualified oath for the purpose of service as a pastor of a church in Canada does not constitute an expatriation of a citizen (*ibid.* p. 722); so of a qualified oath of allegiance to act as public school teacher in Canada (*ibid.* p. 722). On the other hand, it has been held that the acceptance of military or civil office under a foreign government by an American citizen, if such acceptance rendered him a citizen of such country without further formality, "would be deemed a voluntary abandonment of his American status." (Mr. Hay to Mr. Turley, 1899, *ibid.* p. 735; Mr. Seward to Mr. Foster, 1879, *ibid.* p. 732; Mr. Hay to Mr. Smith, 1898, *ibid.* p. 730; Mr. Olney to Mr. Willis, 1895, *ibid.* p. 729.)

In 1907, by the act of March 2, 1907, chapter 2534, section 2 (34 Stat. 1228), Congress for the first time provided:

"That any American citizen shall be deemed to have expatriated himself when he has been naturalized in any foreign state in conformity with its laws, or when he has taken an oath of allegiance to any foreign state.

"When any naturalized citizen shall have resided for two years in the foreign state from which he came, or for five years in any other foreign state it shall be presumed that he has ceased to be an American citizen, and the place of his general abode shall be deemed his place of residence during said years: Provided, however, That such presumption may be overcome on the presentation of satisfactory evidence to a diplomatic or consular officer of the United States, under such rules and regulations as the Department of State may prescribe: And provided also, That no American citizen shall be allowed to expatriate himself when his country is at war."

In construing this act, the question first presented is whether it was intended as declaratory of the existing and long-established policy of the State Department, or whether it was intended to enact into law a new and extended doctrine—in other words, whether Congress, in using the words “oath of allegiance,” intended thereby to include or exclude the limited and qualified oaths of allegiance which theretofore had never been held by the State Department to work expatriation.

The question is not free from difficulty, since in order to sustain the inclusive definition of the phrase it would be necessary to construe the statute as enacting that a United States citizen should be deemed to have lost his American citizenship prior to, or without, gaining a citizenship in any other country. It would seem that so to hold would impute to Congress an intention of enacting a far harsher doctrine than had ever been adopted by the diplomatic authorities of this country.

The legislative history of the act is as follows:

Pursuant to a suggestion contained in a report presented June 6, 1906, by the House Committee on Foreign Affairs (Rept. 4784, 59th Cong., 1st sess.), on a joint resolution adopted by the Senate, the Secretary of State appointed a commission, composed of James Brown Scott, the Solicitor for the State Department, David Jayne Hill, the United States minister to the Netherlands, and Gaillard Hunt, the Chief of the Passport Bureau, to investigate and make recommendations as to appropriate legislation with relation to citizenship, expatriation, and the protection of American citizens abroad, subjects concerning which many difficult and vexatious questions had arisen since the foundation of this Government. This commission recommended that—

“The law asserting the right of expatriation (sec. 1999, Rev. Stat.) should be supplemented by an act declaring that expatriation of an American citizen may be assumed:

“First. When he obtains naturalization in a foreign state.

"Second. When he engages in the service of a foreign government and such service involves his taking an oath of allegiance to such government.

"Third. When he becomes domiciled in a foreign state, etc., etc."

In its observations upon its first and second recommendations, the commission said:

"The first and second clauses of the recommendations require little comment. *Other countries, like our own, do not naturalize foreigners until they have foresworn all other allegiance*, and an American citizen who foreswears allegiance to the United States has expatriated himself from the United States.

"*He has done so with equal certainty when he takes an oath of allegiance to a foreign government in order to enter its service.* It is true that because of conflicting laws on the subject of citizenship in different countries a child may be born to a double allegiance; but no man should be permitted deliberately to place himself in a position where his services may be claimed by more than one government and his allegiance be due to more than one." (House Doc. No. 326, 59th Cong., 2d sess., p. 23.)

It is to be noted that the statements of the commission above italicized were not strictly accurate. The statement that "*other countries, like our own, do not naturalize foreigners until they have foresworn all other allegiance*," is not sustained in fact, since the Canadian oath of allegiance above quoted contains no reference whatever to renunciation of prior allegiance. Neither was it true, as a general rule, that an American citizen has expatriated himself "*when he takes an oath of allegiance to a foreign government in order to enter its service.*" See the citations from Moore's International Law Digest, *supra*.

The question arises, therefore, whether Congress in framing the first paragraph of section 2 of the act relied on the statements made by the commission, or whether the Committees on Foreign Relations of the House and Senate, after an independent investigation of the subject, concluded that the language adopted was appropriate to cover

only those cases where the taking of the oath of allegiance in the service of the foreign country *per se* constituted the person a citizen of that country.

The bill "H. R. 24122," embodying the recommendations of the commission, was introduced and reported to the House by Mr. Perkins, of the Committee on Foreign Relations—H. Report 6431, Fifty-ninth Congress, second session, January 18, 1907. The pertinent portions of the report provided that:

"Perhaps the most important provision of the bill is desired by the State Department to guard against complications in which this country has often been involved. All desire that the flag of this country should protect an American citizen to the fullest extent. But none of us desires that some foreigner who does not intend to cast his lot permanently with us should endeavor to avail himself of the flag as a fraudulent protection. Many foreigners come here, become naturalized, and then return to their own countries or migrate to other parts of the world, without any intention of returning to this country. They have not become citizens in good faith, but they seek to avail themselves of the protection of our citizenship in avoiding responsibility to which they may be subjected in other parts of the world.

"This is not right. The citizenship of the United States should not be sought or possessed for commercial or dishonest ends. To guard against this evil this bill provides that a naturalized citizen who leaves this country and dwells elsewhere continuously for five years shall be presumed to have abandoned his citizenship. This presumption can be overcome, but such a provision as this would be a great assistance to the Department of State, would avoid possibilities of international complications, and will prevent those who are not entitled to its protection from dishonestly hiding under the American flag."

It is quite evident from the report that the cardinal purpose of section 2 is not to provide additional methods whereby American citizens might expatriate themselves. The debate upon the bill in the House and Senate dealt almost exclusively with the second paragraph of that sec-

tion, relating solely to naturalized citizens. The first paragraph attracted no attention whatever, and so far as appears may have been considered merely declaratory of existing law. (See Cong. Rec. 59th Cong., 2d sess., pp. 1463-1467.)

I find it, however, unnecessary to decide whether, under this statute as properly construed, Mr. Berryman has expatriated himself in the present case; for whether his act in taking the qualified oath of allegiance to Canada, and in enlisting in the Canadian Army, did or did not work his own expatriation, I am of the opinion that the loss of American citizenship by the husband would not *ipso facto* forfeit the citizenship of his wife.

The term "citizen of the United States" denotes political rather than civil status. As set forth by Lord Westbury in *Udny v. Udny* (1869) L. R., 1 Scotch and Divorce Appeal Cases, 441, 457:

"The law of England, and of almost all civilized countries, ascribes to each individual at his birth two distinct legal states or conditions; one by virtue of which he becomes the subject of some particular country, binding him by the tie of natural allegiance, and which may be called his political status; another, by virtue of which he has ascribed to him the character of a citizen of some particular country, and as such is possessed of certain municipal rights, and subject to certain obligations. * * *

The question whether Mrs. Berryman is or is not a citizen of the United States is a question of political status, i. e., of nationality. By the old English common law, marriage did not affect a woman's nationality. (Dicey's Conflict of Laws, 2d ed. p. 181; 22 L. R. A. p. 148, note and cases cited; Cockburn's Nationality, pp. 11, 12.) This was also formerly the rule in the United States.

"Marriage with an alien, whether a friend or an enemy, produces no dissolution of the native allegiance of the wife. It may change her civil rights, but it does not affect her political rights or privileges." (*Shanks v. Dupont*, (1830), 3 Peters, 242, 246.)

Whether, in view of Congressional legislation announcing a doctrine as to expatriation directly contrary to that

on which the reasoning of the above case is founded, casts doubt upon the present authority of the case it is not now necessary to decide. (See *Pequignot v. Detroit* (1883) 16 Fed. 211.)

That a wife's citizenship does not necessarily follow that of her husband has been held in *Ruckgaber v. Moore* (1900) 104 Fed. 947, 948:

"By the several statutes of America, France, and Great Britain, the marriage of a citizen of such country with an alien wife confers upon the latter the citizenship of the husband; and this policy of three great powers, in connection with section 1999, of the Revised Statutes, (U. S. Comp. Stat. 1901, p. 1269), which proclaims that expatriation is an inherent right, establishes that the political status of the wife follows that of her husband, *with the modification that there must be withdrawal from her native country, or equivalent act expressive of her election to renounce her former citizenship as a consequence of her marriage.* Some serious objections to this, or even the opposite conclusion, exist, but it has been reached after due consideration of the subject, and pertinent authorities, including *Shanks v. Dupont*, 3 Pet. 242, 7 L. ed. 666; *Pequignot v. Detroit*, (C. C.) 16 Fed. 211; and *Comitis v. Parkerson*, (C. C.) 22 L. R. A. 148, 56 Fed. 556."

See also *Comitis v. Parkerson*, 56 Fed. 556, and Van Dyne on Citizenship (1904), p. 62.

The act of March 2, 1907, chapter 2534, cited above, provided in section 3 that an American woman who marries a foreigner shall take the nationality of her husband, and retain her foreign nationality after termination of the marital relation, but she may resume her American citizenship if abroad by registering as an American citizen with an American consul, or by returning to reside in the United States, or, if already residing in the United States, by continuing to reside there; similarly, a foreign woman who acquires American citizenship by marriage to an American retains her acquired citizenship after termination of the marital relation unless she makes formal renunciation thereof.

This act of 1907, however, made no provision, and there are no decisions of the courts or opinions of the State Department, covering the precise question presented by the facts in the instant case.

The very foundation of the whole doctrine of expatriation, however, is that there shall be an intent on the part of the person to renounce citizenship, or the performance of some act which shows presumptive intent. (*Van Dyne on Citizenship* (1904), p. 275.)

As stated by Secretary Bayard in 1887 (*Moore's International Law Digest*, Vol. III, p. 584) :

"Mere residence abroad is not, however, construed as an abandonment of allegiance. It is only when such residence is accompanied by acts inconsistent with allegiance to the United States or indicative of an intention to abandon it, that this Government holds it to have been renounced."

See also 9 Op. 62 (1857); 14 Op. 154 (1872); *ibid.* 295 (1873).

To whatsoever degree section 2 of the statute of 1907 may modify this general doctrine with respect to an American citizen who performs the acts therein declared to constitute an expatriation, that statute deals in no respect with the status of the citizen's wife in such case.

As to her, the established doctrine must prevail that only intent to renounce her citizenship can work a forfeiture thereof.

Where, however, the loss of the husband's citizenship is not attributable to any act of the wife, and where her intent is expressly contrary to a submission to loss of citizenship on her own part, there would seem to be no foundation for a rule which would peremptorily subject her to such loss against her will. In other words, in the absence of a statute, the common law rule should prevail that a woman's nationality shall remain unaffected by any change in the political status of her husband.

A consideration of Revised Statutes, sec. 1996, and Revised Statutes, sec. 1998, as amended by the act of August 22, 1912 (37 Stat. 356), strongly supports this view. These sections provide that persons who desert the military or

naval service of the United States "are deemed to have voluntarily relinquished and forfeited their rights of citizenship, as well as their right to become citizens; and such deserters shall be forever incapable of holding any office of trust or profit in the United States, or exercising any rights of citizens thereof." It has certainly never been suggested, and as certainly it could never be claimed, that the forfeiture of his right to citizenship by a deserter would work a forfeiture of his wife's citizenship.

I may point out, moreover, that even if the statute is to be so construed as to enounce the harsh doctrine that the husband in this case has lost his American citizenship without acquiring citizenship in any other country, and has thus become merely a "citizen of the world," it would be an even harsher doctrine to hold that the wife, who had in fact performed no act of her own volition, should be placed in the same anomalous position.

In my opinion, Mrs. Berryman is a citizen of the United States, and is being excluded from entrance into this country without warrant of law.

Respectfully,

T. W. GREGORY.

To the SECRETARY OF LABOR.

COPYRIGHT OF LITHOGRAPHIC PRINTS.

In the issuance of copyrights for lithographic prints, the Register of Copyrights is vested with some discretionary powers of investigation and may require a satisfactory showing of compliance with the plain conditions prescribed by the copyright law.

Whether certain lithographic prints produced in Germany are "works of art" within the meaning of section 15 of the copyright act of March 4, 1909 (35 Stat. 1078), is a question of fact which should be determined by the Copyright Office, rather than by the Attorney General.

DEPARTMENT OF JUSTICE,

July 30, 1915.

SIR: I have the honor to acknowledge the receipt from you of a letter from the Librarian of Congress, addressed to the President, and inclosing a communication from the Imperial German Ambassador, dated February 26, 1915.

You request my opinion upon the questions presented by the ambassador.

As I understand his communication, the ambassador, in effect, contends:

(1) That under the copyright law of the United States, applications for copyright registrations of certain lithographic prints manufactured wholly in Germany (samples of which he submits) should be registered by the Register of Copyrights, leaving it to the courts to determine whether the copyrights are valid; and further, that as the general copyright act requires no affidavit of American manufacture in the case of lithographic prints of foreign origin, the Register is without authority to demand a statement from the applicant whether the prints were manufactured in the United States or not.

(2) That the subjects of these lithographs represent almost invariably European and especially German landscapes and the like, that none of them "belong to the American land or life," that they are the reproductions of work of art, and are accordingly within the exceptions embodied within section 15 of the general copyright act.

Considering the questions presented in order:

I.

Section 9 of the copyright act of March 4, 1909 (35 Stat. 1075), provides:

"That any person entitled thereto by this act may secure copyright for his work by publication thereof with the notice of copyright required by this act * * *"

Section 10 provides:

"That such person may obtain registration of his claim to copyright *by complying with the provisions of this act*, including the deposit of copies, and upon such compliance the register of copyrights *shall issue to him the certificate provided for in section fifty-five of this act.*"

Section 15 provides that the text of all books of foreign origin granted protection under the act must be printed or lithographed wholly within the United States,

" * * * which requirements shall extend also to the illustrations within a book consisting of printed text and illustrations produced by lithographic process, or photo-engraving process, and also to separate lithographs or photo-engravings, except where in either case the subjects represented are located in a foreign country and illustrate a scientific work or reproduce a work of art.

Under authority vested in him by section 53 of the copyright act, the Register of Copyrights has made a rule and regulation (No. 29) based upon said section 15, as follows:

"The following works must be manufactured in the United States in order to secure copyright: * * * *all separate lithographs or photo-engravings must be produced by lithographic or photo-engraving process wholly performed within the limits of the United States*, except when the subjects represented in such illustrations in a book or such *separate lithographs* or photo-engravings 'are located in a foreign country and illustrate a scientific work or reproduce a work of art.'

The form of application for registration prepared by the register requires the following statement to be subscribed by the applicant:

"It is hereby claimed that this work comes within the provision of section 15, 'except where the subjects represented are located in a foreign country and illustrate a scientific work or reproduce a work of art.'

The suggestion that the determination of the validity of the registration should be left to the courts, and the necessary inference involved that the duty of the register is purely automatic, and consists wholly (with the single exception of books) in determining whether the subject presented is a lithographic print and therefore within the general class of articles which may be copyrighted, can not be reconciled with the power vested in the register to issue rules and regulations under which he will permit registration under the law. That section of the law plainly indicates that he has at least some measure of discretion in the administration of the act. Manifestly, in the exercise of that discretion he may make such investigation and require such showing of compliance with the law as may be

necessary to enable him to determine whether the prerequisites imposed have been met.

Considering the matter from another viewpoint, section 55 of the copyright act provides:

"That in the case of each entry the person recorded as the claimant of the copyright shall be entitled to a certificate of registration under seal of the copyright office;" and—

"Said certificate shall be admitted in any court as prima facie evidence of the facts stated herein."

If the contention be correct that the register is vested with no discretionary powers of investigation, and has no authority to demand a satisfactory showing of compliance with the plain conditions prescribed by law as prerequisites to the issuance of copyrights, that officer is reduced to the rôle of a mere automaton, who, upon receiving an application for copyright of a lithograph, must register and issue a certificate therefor, which shall thereafter be accepted in the courts as prima facie evidence of the facts stated therein, even though the legal prerequisites to the valid registration of the copyright may have been wholly ignored. Clearly, such a construction would serve to defeat the purpose and intent of the act.

As tersely stated by the Circuit Court of Appeals in the Third Circuit, in *Dejonge v. Breuker* (1911), 191 Fed. 35:

"The case before us can be disposed of on the ground that, assuming that the complainant's painting is such a one, the statutory conditions precedent to the investiture of the right to protection under the copyright law have not been complied with. For 75 years it has been the settled law of this country that protection under the copyright law is granted only to those who perform the conditions essential to a perfect copyright title. * * * Copyright protection is wholly statutory, and one who claims it must prove affirmatively his performance of all the statutory conditions precedent to his right of action."

I conclude, therefore, that the ambassador's first contention is untenable.

II.

The second contention of the ambassador involves largely a question of fact. Conceding, as stated by him, that none of the subjects represented in the lithographic prints "belong to the American land or life," but that all the subjects represented are "located in a foreign country," and that to such extent, the prints fall within the exceptions stated in section 15, *supra*, yet as they are not used to illustrate a scientific work, and consequently do not come within that branch of the exceptions, the question is presented whether they are separate reproductions of "works of art." There is no attempt in the statute to define this term. Its definition is a mixed question of law and fact which in the first instance is to be left to the sound discretion of the Register of Copyrights. (28 Op. 560, 561.)

Since the language of the statute, however, is somewhat inapt, a brief review of its legislative history may assist in developing its true purpose and intent.

As originally reported, to both the Senate and House, by their respective Committees on Patents, section 15 of the bill embodied the exception in these words:

"Except where in either case the subjects represented are located in a foreign country." (Cong. Rec., vol. 43, p. 3702.)

Discussing this exception in the reports (S. Rept. 1108, p. 12; H. Rept. 2222, p. 12, 60th Cong., 2d sess.), the committees said:

"An exception, so far as lithographs and photo-engravings are concerned, is made in case 'the subjects represented are located in a foreign country.'

"It was contended with much force in the hearings before the committee that the *color scheme* in lithographs to illustrate a scientific work, particularly a work of surgery, must be worked out *under the eye of the author*. It was further said that a lithograph reproducing a painting must be worked out in front of the painting, and that possibly the same theory would apply to a lithograph of scenery or any lithograph intended to accurately represent the *color*

scheme of any object. The committee finally decided to leave this matter as it is now found in the bill, *although it was contended that the exception might well be confined to lithographs illustrating a scientific work or reproducing a work of art.*"

Evidently the committees later considered the matter, and decided to incorporate in the section the suggestion contained in the last sentence of the excerpt from their report, quoted and italicized above; and accordingly recommended that as an amendment to, and as a limitation upon that exception, there be added these words "and to illustrate a scientific work or reproduce a work of art;" and such is the language of the statute as enacted.

The amendment was evidently intended to apply to the precise class of subjects to which the committees referred in that portion of their report quoted, *supra*, i. e., to lithographic prints intended to illustrate scientific works, where the *color scheme* was such that it must be worked out under the eye of the author; or where it reproduced a painting which must be worked out in front of the painting, or possibly lithographs of scenery or any lithograph intended to accurately represent the *color scheme*.

The question whether the four specimen prints transmitted by you are "works of art," within the meaning of the statute as above construed, is, as has been stated, principally a question of fact, the solution of which involves the exercise of artistic judgment and discretion, and which should be determined, therefore, by the Copyright Office, rather than by the Attorney General.

Respectfully,

T. W. GREGORY.

To the PRESIDENT.

VALIDITY OF PORTO RICO BOND ISSUES.

Assuming that the proceedings of the Executive Council of Porto Rico in connection with the proposed issue of \$300,000 refunding bonds and of \$400,000 irrigation bonds were regular and that these bonds have been authorized by the council, said bonds will, when duly sold, delivered, and paid for, constitute the valid obligations of the people of Porto Rico.

DEPARTMENT OF JUSTICE,

August 17, 1915.

SIR: I have the honor to acknowledge receipt of your letter of July 9, in which you request my opinion upon the validity of two issues of bonds of the people of Porto Rico, as follows:

"\$300,000 refunding bonds, to be issued under the provisions of Act No. 120 of the Legislative Assembly of Porto Rico, approved July 26, 1913;

"\$400,000 irrigation bonds, to be issued under the provisions of Act No. 128 of the Legislative Assembly of Porto Rico, approved August 8, 1913."

The power to issue bonds conferred upon the people of Porto Rico by the organic act of April 12, 1900 (31 Stat. 77), has been considered and affirmed in several opinions of the Attorney General, heretofore rendered (27 Op. 104; 28 Op. 245; 29 Op. 497; 29 Op. 577; and opinion of Nov. 25, 1913, by Attorney General McReynolds); and the validity of bonds to be issued under the two acts of the Legislative Assembly of Porto Rico here involved was approved in the opinion dated July 10, 1914, rendered to you by my predecessor, Attorney General McReynolds. The only questions, therefore, which it will be necessary for me to consider are, whether the present issues will fulfill all legislative requirements and whether the proceedings to authorize them have been properly taken.

If, as stated in your letter, the present bonded indebtedness of the people of Porto Rico, including the proposed issues of bonds, will not exceed 7 per cent of the aggregate tax valuation of its property, these issues will, of course, not be barred by the 7 per cent debt limit provision contained in section 38 of the organic act of April

12, 1900. There is no question but that the irrigation issue is for a public purpose, and as you state that the proceeds of the municipal bonds against which the refunding bonds are to be issued will be used only for public improvements, it is clear that the refunding bonds will be used for a public purpose. These points were also considered in the opinion of July 10, 1914, above mentioned, and it is unnecessary for me to repeat what was there said.

With reference to the issue of \$300,000 refunding bonds, I may call your attention to the fact that the certificate of the secretary of the Executive Council, which you have submitted to me, shows that municipal and school board bonds in excess of the present issue of refunding bonds will be held by the people of Porto Rico to secure the loans represented by the refunding bonds. It does not show, however, that the aggregate amount of refunding bonds including this issue, outstanding and unpaid, will not exceed the aggregate amount of unpaid municipal corporation and school board bonds held and owned by the people of Porto Rico, as required by section 2 of the act of July 26, 1913 (Act No. 120). Assuming, however, that this provision has been complied with and that the proceedings of the Executive Council (a record of which is not before me) have been properly taken, I am of the opinion that these bonds will, when duly sold, delivered, and paid for, constitute the valid obligations of the people of Porto Rico.

I have not been furnished with a record of the proceedings of the Executive Council in connection with the issue of \$400,000 irrigation bonds, but I assume that those proceedings were regular and that the bonds have been duly authorized by the council. If so, I am of the opinion that these bonds also will, when duly sold, delivered, and paid for, constitute the valid obligations of the people of Porto Rico.

Respectfully,

T. W. GREGORY.

To the SECRETARY OF WAR.

430 *Promotion of Apprentices in Bureau of Standards.*

PROMOTION OF APPRENTICES IN BUREAU OF STANDARDS.

The provision of the act of July 16, 1914 (38 Stat. 502), authorizing the promotion of apprentices in the Bureau of Standards, includes "laboratory," "shop," and "office" apprentices.

DEPARTMENT OF JUSTICE,

August 21, 1915.

SIR: I have the honor to acknowledge receipt of your communication of June 11, 1915, transmitting a letter from the Secretary of Commerce, dated June 10, 1915, in which my opinion is requested with regard to the promotion of office apprentices in the Bureau of Standards.

The legislative, executive, and judicial appropriation act approved July 16, 1914 (38 Stat. 454, 502), appropriates money for salaries of "laboratory apprentices," "shop apprentices," and "office apprentices" in the Bureau of Standards. Immediately following these appropriations is this paragraph:

"Apprentices in the Bureau of Standards may be promoted after satisfactory apprenticeship, with the approval of the Civil Service Commission, to positions corresponding to the journeyman grades for which their duties logically prepare them without regard to apportionment: Provided, that they thus acquire no rights to transfer to other lines of work."

The Department of Commerce and the Civil Service Commission are in disagreement as to the construction of this provision. The Department requested the commission to conduct examinations for the purpose of establishing special registers for office and shop apprentices. The commission complied with this request as to shop apprentices, but declined to do so as to office apprentices, upon the ground that the latter were really messenger boys, and should be recruited from the messenger boy register.

The Commission declined to approve the proposed promotion of office apprentices in the Bureau of Standards to clerical positions, upon the ground that to do so would contravene the rule of apportionment of such positions among the several States according to population, required by the civil-service law and the rules of the commission,

office apprentices being themselves appointed without regard to apportionment. The commission further contends that such promotions would violate section 6 of civil-service Rule XI, which provides that:

"Messenger boys appointed without regard to the apportionment shall not be promoted or transferred to apportioned positions whether they are residents of States or Territories which are entitled to appointments to apportioned positions or not."

It is urged by the Commission that "office apprentices" in the Bureau of Standards are in fact messenger boys, that they perform only the duties of messenger boys, and that to permit the promotion of such apprentices to clerical positions in the apportioned service, with the possibility of subsequent transfer to clerical positions within the same department or in other departments, would present a method by which the policy of apportionment, fixed by act of Congress, and adhered to by successive administrations during a long period of time, could be done away with by the various departments. Moreover, it appears to the commission unreasonable that the Bureau of Standards should enjoy a privilege with respect to the promotion of its messenger boys possessed by no other department or bureau of the Government.

The Department of Commerce, on the other hand, contends that when Congress used the word "apprentices" in the controverted provision of the appropriation act, it meant all the classes of apprentices, "laboratory," "shop," and "office," and that, as a matter of construction, it can not be held that the word does not include "office apprentices," especially in view of the appropriation immediately preceding made in so many words for each of the three classes of apprentices. It is claimed that the duties of office apprentices are such as to prepare them for the eventual assumption of clerical positions, and that these persons are just as much true "apprentices," as the laboratory and shop apprentices, whose apprenticeship is admittedly for the purpose of preparing them for more advanced scientific or mechanical positions.

I am of opinion that the contention of the Department of Commerce in the premises is correct, and, therefore, that its request to the commission to conduct examinations was warranted by the law. It seems impossible to escape the conclusion that the word "apprentices" in the disputed provision of the appropriation act includes the so-called office apprentices as well as laboratory and shop apprentices. Prior to the year 1913 the only apprentices in the Bureau of Standards who were described as such in the statute were laboratory apprentices, for whom, following the act of March 18, 1904 (33 Stat. 139), appropriations were regularly made.

In these acts there was also an appropriation for messenger boys at the same compensation then and now allowed for apprentices. In the year 1913 (62d Cong., 3d sess., 37 Stat. c. 142, p. 786), however, three classes of apprentices were appropriated for, to wit, "laboratory," "shop," and "office apprentices"; and messenger boys as such were nowhere named. In the succeeding year of 1914 (38 Stat. 454, 502, c. 141, 63d Cong., 2d sess., being the act in question) these three classes of apprentices were again named and appropriated for, and messenger boys were again entirely omitted. Congress thus established in the Bureau of Standards an official rank known as an "apprentice," divided into three classes designated by the division to which they are respectively attached. That the office apprentice may be charged with the performance of the same duties as those commonly performed by messenger boys does not alter the official status which Congress has seen fit to give him. The clause now in question follows the specific appropriations for these three classes of apprentices; it refers to apprentices in general. In the absence of some controlling consideration to the contrary, is it not clear that the generic term must be held to embrace all those classified under it?

This conclusion is emphasized, moreover, by the fact that prior to this enactment laboratory apprentices were already being appointed without reference to residence or apportionment, in accordance with the proviso to section 2

of civil-service Rule No. 7; and it must be assumed that Congress intended by the clause in question to extend this condition to apprentices of other classes.

It is suggested that an opposing consideration is to be found in the use of the term "journeyman grades" as designating the positions to which apprentices may be promoted. Attention is called to the historic derivation of the words "apprentice" and "journeyman"; the former as a person bound by indenture to serve another for a certain term, with a view to learning an art or trade; and the latter as meaning a mechanic who has completed his apprenticeship, and, having learned his handicraft or trade, is entitled to hire out by the day. It is insisted that clerical positions can not under the most liberal interpretation be held as coming within any definition of journeyman, and, therefore, that there are no journeymen grades for which the duties of office apprentices "logically prepare them." But, in my opinion, it sufficiently appears that neither the word "apprentice" nor the word "journeyman" are used in this statute in their strict or ancient sense. For instance, the apprentices, so called, are not indentured, and the journeymen are not necessarily hiring by the day or engaged in the mechanic arts.

The appropriation act seems to recognize three divisions existing in the Bureau of Standards: *The laboratory*, for which are provided physicists, associate physicists, assistant physicists, chemists, associate chemists, assistant chemists, laboratory assistants, laboratory helpers, and, finally, "laboratory apprentices;" *the shop*, for which are provided mechanics, skilled woodworkers, skilled laborers, electricians, glassworker, pipe fitter, glass blower, etc., and "shop apprentice;" and *the office*, in which are installed secretary, storekeeper, librarian, clerks, and so-called "office apprentices." The words "journeyman grades" could only have been used as a convenient term in contrast to apprentices, as distinguishing those who in their respective divisions occupy positions of greater responsibility or experience than do mere apprentices.

In reaching the conclusion that I do I have not overlooked the fact that by the express terms of the act such promotions may only be allowed "with the approval of the Civil Service Commission." If this provision can be treated as vesting unrestricted discretion in the Civil Service Commission, they may decline to approve such promotions for any reason which appeals to their judgment, among others, that to promote these office apprentices to clerical positions would nullify the rule of apportionment with respect to such positions in the various departments, since the promoted apprentice, after becoming a clerk, could transfer to a similar position in the same or some other department, and in time the clerical force in the various departments would become filled by residents of the District of Columbia far in excess of its quota under the rule of apportionment. But Congress, by the provision in question, definitely expressed its will that as to the promotion of these particular employees in this particular bureau the rule of apportionment should no longer apply, with the proviso, however, that the office apprentices so excepted shall not acquire any rights to be transferred to other lines of work, which limitation can be construed and enforced by the Civil Service Commission. It must be held to have weighed all the consequences of such an enactment. It can not be presumed that having so expressed itself it intended to leave the whole matter open for the further deliberation of the commission. It would seem that the disapproval of the commission must go to individual cases, and upon other grounds. The argument drawn from the effect which the statute may have upon the rule of apportionment in general, and upon the clerical force of other departments, goes to the policy of the law but can not, in my opinion, control its interpretation.

Respectfully,

T. W. GREGORY.

To the **PRESIDENT.**

INCOME TAX—NONRESIDENT ALIENS.

Nonresident aliens—corporate or individual—not carrying on any business, trade or profession in the United States are not subject to tax under the act of October 3, 1913 (38 Stat. 166), on income derived from (a) stocks or bonds of domestic corporations doing a domestic business, or (b) from obligations secured by mortgages on tangible property within the United States, whether such obligations be held by the owners or by their collecting agents here.

Opinions of October 23, 1913 (30 Op. 230), July 15, 1914 (30 Op. 273), and February 19, 1915, adhered to.

DEPARTMENT OF JUSTICE,

August 24, 1915.

SIR: I have the honor to acknowledge receipt of your two letters of July 21, 1915, wherein you ask my opinion as to whether nonresident aliens—corporate or individual—not carrying on any business, trade, or profession in the United States are subject to tax under the act of October 3, 1913 (38 Stat. 166 et seq.), on income derived from (a) stocks or bonds of domestic corporations doing a domestic business, or (b) from obligations secured by mortgages on tangible property within the United States, whether such obligations be held by the owners or by their collecting agents here.

On October 23, 1913, my predecessor rendered an opinion that this act did not tax such income from obligations whether secured or unsecured (30 Op. 230). On July 15, 1914 (30 Op. 273), he rendered a second opinion that it did not tax such income from stocks of domestic corporations. And on February 19, 1915, I rendered an opinion that the fact that bonds of domestic corporations were held here by such collecting agents did not distinguish them under the above rule. You, in effect, ask a reconsideration of these opinions. As expressed to you, they were not elaborated; but no subject has received more painstaking consideration at the hands of this Department. Nevertheless because of your earnest representations it has been again most carefully reviewed.

The language to be interpreted is found in the last clause of subdivision 1 of Paragraph A. of Section II (38 Stat. 166), and reads:

“And a like tax shall be assessed, levied, collected, and paid annually upon the entire net income from all property owned and of every business; trade, or profession carried on in the United States by persons residing elsewhere.”

I am compelled to adhere to the opinions heretofore expressed, and to answer your present question in the negative. My conclusion is confirmed by a consideration of the history both of this act, and of the earlier related legislation.

HISTORY OF THIS ACT.

On April 7, 1913, it was introduced by Congressman Hull as H. R. 3321. On May 9, 1913, it passed the House, having carried the above language from the beginning save that the word “collected” was later inserted after the report of the Senate Finance Committee of July 11, 1913. This paragraph stood otherwise unchanged until September 6, 1913, when Senator Williams, in Senate Committee of the Whole, offered this amendment to immediately follow the paragraph:

“*Provided*, That the tax herein imposed upon individuals with respect to their incomes shall likewise be levied upon all interests as such, which may be due or payable to any *nonresident* alien, subject to the exemptions and deductions provided in this section, which shall be made at the source in his behalf.” (Vol. 50, Cong. Rec., 63d Cong., 1st sess., Sept. 6, 1913, pp. 4378, 4379.)

The day before, and the very day it was offered, the amendment was the subject of two letters from Assistant Secretary of the Treasury Hamlin to the author of the bill. His letters disclose that Mr. Hull was himself the author of the amendment; that its purpose was to reach income from foreign-held intangibles. The first suggests a corresponding amendment to cover such income of *foreign* corporations, and the writer in both suggests grave doubt as to the constitutional power of Congress to deal with “this perplexing question.” On September 9 the bill passed the Senate carrying that amendment. The House refused concurrence. Later a joint conference committee

recommended striking out that amendment. Its report as to Section II stated that "no material change is made in the fundamental features of the House provision." (Vol. 50, part 6, Cong. Rec., 63d Cong., 1st sess., p. 5229.) The recommendation was adopted, and the amendment rejected.

THE EARLIER LEGISLATION.

The acts of 1861 (sec. 49, 12 Stat. 309) and 1862 (sec. 90, 12 Stat. 473) each carried this language:

"Property, securities or stocks owned in the United States by any citizen residing abroad."

August 2, 1861, the chairman of the House managers of the conference committee said:

"Where persons reside abroad *who hold property in this country* on which they derive an income, which they spend abroad, we have laid an income tax of five per cent. We thought it right that they should bear more of the burden of the country than those who spend their income in the United States." (Cong. Globe, 37th Cong., 1st sess., p. 415.)

The act of 1864 (sec. 116, 13 Stat. 281), as amended by the act of March 3, 1865 (13 Stat. 479), carrying this language, "incomes of every person residing in the United States, or of any citizen of the United States residing abroad," with a provision for deduction by corporations of the tax on *all interest* paid by them (which was held to be but a collection scheme not extending the class subject to tax) was held in *Railroad Co. v. Jackson*, 7 Wall. 262, not to be aimed at nonresident aliens. It was amended July 13, 1866 (14 Stat. 138), to include income from "every business, trade, or profession carried on in the United States" by nonresident aliens. Thus we see that of the language here involved, the phrase "business, trade, or profession" came from the act of 1866 while the phrase "property owned in" came from the act of 1861.

Doubtless because of the *Jackson* case, and on March 10, 1866 (14 Stat. 4, 5), Congress, in connection with the words "dividends * * * payable" and "interests on coupons, dividends or profits * * * payable" found

in the act of 1864 (13 Stat. 233), defined the payees as "including *nonresidents whether citizens or aliens*"; and by the amendments of July 13, 1866 (14 Stat. 138, 139), incorporated the language of the definition in each proper section. Of this language the court said, in the *Jackson* case (269):

"It is not important, however, to pursue the argument, as Congress has since in *express terms* by the acts of March 10 and July 13, 1866, imposed a tax on alien non-resident bondholders."

THE PRESENT QUESTION.

Congress doubtless has the power to tax such incomes from stocks so held (*Corry v. Baltimore*, 196 U. S. 474; *Jellenik v. Huron C. M. Co.*, 177 U. S. 1; *Covington v. Bank*, 198 U. S. 111; *Pullman Car Co. v. Pennsylvania*, 141 U. S. 22; *Buck v. Beech*, 206 U. S. 392; *Miller v. United States*, 11 Wall. 297; *Matter of Bronson*, 150 N. Y. 4, 5); and it may have a like power as to all *securities* (*United States v. Bennett*, 232 U. S. 299; *New Orleans v. Stemple*, 175 U. S. 309; *Bristol v. Washington County*, 177 U. S. 133; *Assessors v. Bank*, 191 U. S. 388; *Metropolitan Ins. Co. v. New Orleans*, 205 U. S. 395; *L. L. & G. Ins. Co. v. New Orleans Assessors*, 221 U. S. 346), though the latter may be doubtful (*Wheeler v. Sohmer*, 233 U. S. 434; *Orleans Parish v. Insurance Co.*, 216 U. S. 523, and *Matter of Bronson*, 150 N. Y. 8). But whatever be the power of Congress in this regard it has not by the present act (1913) undertaken to exercise any such power.

A purpose to tax must be declared in clear and unambiguous language. *Eidman v. Martinez*, 184 U. S. 578; *United States v. Ishmm*, 17 Wall. 504; *United States v. Wigglesworth* 28 Storey, 373. And in the absence of legislative declaration to the contrary the place of taxation of intangibles is at the domicile or residence of their owner. *Hawley v. Malden*, 232 U. S. 11, 12; *Covington v. Bank*, *supra*.

While these rules do not demand a declaration in direct or self-interpreting words, they do require that the lan-

guage, when read in the light of the controlling principles of statutory construction, shall amount to a clear and unambiguous declaration of a purpose to lay the *particular* tax.

It can not be fairly said that the language here used is so direct as to be self-interpreting. At most it *might* be read as for the tax. To resolve whatever doubt exists resort may be had to the history of the act and the prior legislation on the subject. *United States v. Bowen*, 100 U. S. 513; *Myer v. Car Co.*, 102 U. S. 11; *Deffebach v. Haelke*, 115 U. S. 402; *Bate Refrigerating Co. v. Sulzberger*, 157 U. S. 36, 39; *United States v. Burr*, 159 U. S. 85, 86.

1. Congress had never before so acted save by express positive language.

The acts of 1861 and 1862, *supra*, were limited to incomes of persons (citizens or aliens) residing in the United States and incomes from "property, securities or stocks owned * * * in the United States" by *its citizens* residing abroad. The act of 1864, *supra*, puts the citizen residing abroad on the same plane with persons residing in the United States. Neither it nor the amendment of 1865 enlarges or changes the class of persons to be taxed. Congress first sought to reach nonresident aliens by the acts of March 10 and July 13, 1866, *supra*. And prior to 1870 the Supreme Court of the United States in the *Jackson* case had pointed out what of the language already used by Congress did not operate to reach nonresident aliens, and what of its language on the other hand expressly included them. None of the latter language was used in this bill.

2. While adopting in part the language "property, securities or stocks owned," etc., from the act of 1861, Congress in the present act omitted the words "securities or stocks." Of course the word "property" is broad enough to include both tangibles and intangibles. Nevertheless the insertion of the words "securities or stocks" in the original act of 1861 indicates an intention that the word "property" should not include "securities or stocks"; and the adoption of the word "property" only in the present

act indicates a purpose to exclude, rather than include, these intangibles.

3. Not only were the words "securities or stocks" omitted, but the "Williams amendment" itself carried a recognition that the phrase "property owned in" did not include foreign-held intangible securities. And when, after its adoption by the Senate, the House refused to concur and the conference committee, surrendering to the House, abandoned that amendment, in my judgment the legislative will was clearly expressed against the purpose to tax these intangibles.

4. None of the provisions relating to withholding the tax at its source can operate to enlarge the language here to be read, since these provisions are all expressly and even repeatedly limited to the class of persons who are otherwise subject to the tax, making the case stronger than that before the court in *Railroad Co. v. Jackson*, *supra*.

While it is true that this Department should resolve reasonable doubts as to the law in favor of the Treasury, to the end that no possible rights of the Government be surrendered in advance of judicial decision, this can not lessen the force of the rule that the purpose to so tax must be clearly expressed, and such a reading adopted, if within the purpose of the act, as will relieve the legislation from possibility of attack on constitutional grounds.

The suggestion that Congress could not have meant to relieve nonresident alien holders while taxing resident holders on similar securities is completely answered by the fact that, as declared by the Supreme Court of the United States in the *Jackson* case, it unquestionably did so in the first income-tax act of 1861.

The rule announced by my predecessor in this regard was perpetuated in regulations and practice by the Treasury Department and has since been adhered to. It ought not to be disturbed short of judicial decision, save for compelling reasons. The fundamental question here is involved in the issues raised in a case set for trial in the Eastern District of Pennsylvania in October next.

As to the phase of the question involving the tax on income of foreign corporations, no substantial distinction can

be made between the language of that portion of the act and the language first above quoted.

For these reasons I am of the opinion that Congress has expressly refused in the present income-tax act to tax such intangibles when held by nonresident aliens.

Respectfully,

T. W. GREGORY.

TO THE SECRETARY OF THE TREASURY.

VESSELS SUBJECT TO SECTION 14 OF SEAMEN'S BILL.

When not actually carrying passengers, neither foreign cargo nor foreign passenger steam vessels leaving ports of the United States are subject to the regulations prescribed by section 14 of the so-called "Seamen's bill" of March 4, 1915 (38 Stat. 1170).

Only foreign private steam vessels carrying passengers from any port of the United States to any other place or country, which are not exempt by reason of the conditions set forth in section 4400 of the Revised Statutes, as amended, are subject to said regulations.

DEPARTMENT OF JUSTICE,

August 25, 1915.

SIR: I have the honor to acknowledge the receipt of your letter of June 18, 1915, wherein, in connection with certain accompanying papers submitted by the Secretary of Commerce, you ask my opinion as to whether foreign cargo or foreign passenger steam vessels leaving ports of the United States are subject to the regulations prescribed by section 14 of the so-called "Seamen's bill," approved March 4, 1915 (38 Stat. 1164, 1170).

I am of opinion that when not actually carrying passengers neither foreign cargo nor foreign passenger steam vessels are subject to the provisions of this section. Only foreign private steam vessels carrying passengers from any port of the United States to any other place or country are so subject. To this latter rule, however, an exception must be noted in favor of a vessel belonging to a country whose inspection laws at the time of the voyage approximate our own and which accords to our vessels like privileges of home inspection: *Provided* such vessel is (1) possessed of an unexpired inspection certificate properly

issued under and evidencing compliance with such foreign laws, or (2) where its certificate so issued has expired, it has properly obtained in lieu thereof from the Secretary of Commerce a special permit to depart from a port of the United States if possessing an unexpired certificate. My reasons for this conclusion are as follows:

This section 14 of the seamen's bill is an additive amendment to section 4488 of the Revised Statutes, which itself had been previously amended in respects not material here by the acts of March 2, 1889, 25 Stat. 1012; April 11, 1892, 27 Stat. 16; and March 3, 1905, 33 Stat. 1024. Section 4488 was originally enacted as section 52 of the act of February 28, 1871, entitled "An act to provide for the better security of life on board of vessels propelled in whole or in part by steam," etc. (16 Stat. 440.) Section 41 of the last-named act, which became section 4400 of the Revised Statutes, defined the vessels subject to the operation of the act, and, of course, to the operation of its section 52, now section 4488, Revised Statutes. This section 41 was amended by the acts of August 7, 1882, 22 Stat. 346; March 1, 1895, 28 Stat. 699; February 15, 1902, 32 Stat. 34; and March 17, 1906, 34 Stat. 68, the last amendment being a complete redraft. Since section 14 is expressly an amendment of preexisting law which is to be found in these sections 4400 and 4488 of the Revised Statutes, I quote those portions of the same which are material as they stood prior to March 4, 1915.

"SEC. 4400. All steam vessels navigating any waters of the United States which are common highways of commerce or open to general or competitive navigation, excepting public vessels of the United States, vessels of other countries, and boats propelled in whole or in part by steam for navigating canals, shall be subject to the provisions of this title. (Original section 41.)

*"And all foreign private steam vessels carrying passengers from any port of the United States to any other place or country shall be subject to the provisions of sections * * * forty-four hundred and eighty-eight * * * of this title, and shall be liable to visitation and inspection*

by the proper officer, in any of the ports of the United States, respecting any of the provisions of the sections aforesaid (amendment of August 7, 1882): *Provided, however, That when such foreign passenger steamers* belong to countries having inspection laws approximating those of the United States, and having unexpired certificates of inspection issued by the proper authorities in the respective countries to which they belong, they shall be subject to no other inspection than necessary to satisfy the local inspectors that the condition of the vessel, her boilers, and *life-saving* equipments are as stated in the current certificate of inspection; but no such certificate of inspection shall be accepted as evidence of lawful inspection except when presented by steam vessels of other countries which have by their laws accorded to the steam vessels of the United States visiting such countries the same privilege accorded herein to the steam vessels of such countries visiting the United States; etc. * * *. (Amendment of February 15, 1902.)

"It is further provided that the Secretary of Commerce and Labor may, in his discretion, permit *any foreign passenger steamer coming within the provisions of this act* whose foreign certificate of inspection shall have expired at sea since last leaving the country to which said vessel belongs, or while said vessel shall have been in a port of the United States, to sail upon her regular route without undergoing any further inspection than would have been required had said foreign certificate of inspection been in force: *Provided, however, That* such discretion shall be exercised only with respect to vessels operated upon regularly established lines, and in cases where such foreign passenger steamer will be regularly inspected by the authorities of her home government before her next return to a port of the United States. (Amendment of March 17, 1906.)

"SEC. 4488. Every steamer navigating the ocean, or any lake, bay, or sound of the United States, shall be provided with such numbers of lifeboats, floats, rafts, life preservers (line-carrying projectiles, and the means of propelling

them) and drags, as will best secure the safety of all persons on board such vessel in case of disaster; and *every seagoing vessel carrying passengers*, and every such vessel navigating any of the northern or northwestern lakes, shall have the lifeboats required by law, provided with suitable boat-disengaging apparatus, so arranged as to allow such boats to be safely launched while such vessels are under speed or otherwise, and so as to allow such disengaging apparatus to be operated by one person, disengaging both ends of the boat simultaneously from the tackles by which it may be lowered to the water. And the board of supervising inspectors shall fix and determine, by their rules and regulations, the character of lifeboats, floats, rafts, life preservers (line-carrying projectiles, and the means of propelling them) and drags that shall be used on such vessels and also the character and capacity of the pumps or other appliances for freeing the steamer from water in case of heavy leakage, the capacity of such pumps or appliances being suited to the navigation in which the steamer is employed. (*Original section 4488 as amended in 1889, shown in parentheses.*) *Every vessel subject to the provisions of this title shall, while in operation, carry one life preserver for each and every person allowed to be carried on said vessel by the certificate of inspection, including each member of the crew: Provided, however, That upon such vessels and under such conditions as are specified in section forty-four hundred and eighty-two floats may be substituted for life preservers * * * etc."* (*Amendment of March 3, 1905.*)

It will thus be observed that while section 4488 is directed in terms to "every steamer navigating the ocean, or any lake, bay, or sound of the United States," and to "every seagoing vessel carrying passengers," section 4400, which precedes it, restricts its application to "foreign private steam vessels carrying passengers from any port of the United States to any other place or country," provided they be not exempt by reason of the conditions set forth in that section.

So the law stood at the time of the passage of the seamen's bill. We are therefore confronted solely with the

question whether it was the intention of that enactment to enlarge the class of foreign vessels to which the inspection laws should apply.

The clause which we are now considering reads as follows:

"SEC. 14. *That section forty-four hundred and eighty-eight of the Revised Statutes is hereby amended by adding thereto the following: "The powers bestowed by this section upon the Board of Supervising Inspectors in respect of lifeboats, floats, rafts, life preservers, and other life-saving appliances and equipment, and the further requirements herein as to davits, embarkation of passengers in lifeboats and rafts, and the manning of lifeboats and rafts, and the musters and drills of the crews, on steamers navigating the ocean, or any lake, bay, or sound of the United States, on and after July first, nineteen hundred and fifteen, shall be subject to the provisions, limitations, and minimum requirements of the regulations herein set forth, and all such vessels shall thereafter be required to comply in all respects therewith: Provided, That foreign vessels leaving ports of the United States shall comply with the rules herein prescribed as to life-saving appliances, their equipment, and the manning of the same."*

For its interpretation we are entitled to resort not only to the preexisting law of which it was made a part, but also to its legislative history. (*United States v. Bowen*, 100 U. S. 508, 513; *Myer v. Car Co.*, 102 U. S. 1, 11; *Deffeback v. Hawke*, 115 U. S. 392, 402; *United States v. Burr*, 159 U. S. 78, 85, 86.)

The London convention on "Safety of life at sea," agreed to on January 20, 1914 (but never ratified by the United States), declared a purpose to secure "safety of life at sea" (Art I, ch. 2), and made "merchant vessels * * * mechanically propelled, which carry more than 12 passengers and which proceed from a port" domestic to a port foreign, or conversely, subject to its provisions (Art. II, ch. 2); and obligated the nation to which the ship belonged to accomplish the necessary legislation to make the convention effective. (Art. III, ch. 2; Art.

XXXIV, ch. 5; Arts. LVII, LXI, LXV, ch. 7; and note found opposite sec. 65 in S. Doc. No. 476, 63d Cong., 2d sess., ordered printed May 1, 1914.)

At the date last mentioned the La Follette bill (S. 136) was pending in Congress. On June 29, 1914, the House Committee on Merchant Marine and Fisheries (Rept. 852, 63d Cong., 2d sess.) recommended an amendment to Senate bill No. 136, striking out all after the enacting clause and inserting in lieu thereof the so-called Alexander bill (H. R. 4616). This substitute, with certain modifications (all of minor importance save the proviso here involved), was passed as the so-called "Seamen's bill." Section 14 first appeared in this substitute. That part of it which precedes the proviso remained unchanged until passage. The proviso now in question was added thereto by a later conference amendment.

This section 14 deals entirely with life-saving appliances and methods. As to appliances, it relates chiefly to lifeboats, of which the report (No. 852) said:

"The lifeboat provisions in the committee substitute, as applied to ocean-going vessels of the United States are substantially those contained in the Convention on Safety of Life at Sea, adopted at London January 20, 1914. They are applied in a modified form to United States vessels in ocean voyages on routes not more than 20 nautical miles off-shore, and on the Great Lakes to meet the conditions in those services."

Of the amendatory proviso,

"That foreign vessels leaving ports of the United States shall comply with the rules herein prescribed as to life-saving appliances, their equipment, and the manning of the same,"

the conference report said:

"While section 4488 of the Revised Statutes, which is amended by section 14, seems to apply to foreign vessels, as well as to vessels of the United States, the proviso was inserted by the conferees to make it clear that it shall so apply;"

and the chairman, when the report was under consideration, said:

"It was considered necessary; but at the same time perhaps it was not necessary, because I believe under the law that would be so, anyway. We wanted, however, to make it clear. I think under the statute that would be true." (Vol. 52, pt. V, Cong. Rec., 63d Cong., 3d sess., pp. 4640, 4733, 4736.)

I think it clear that the foreign vessels so mentioned in this proviso are such foreign vessels, and no other, as were already subject to the preexisting law. There are a number of reasons which lead irresistibly to this conclusion.

When we read the proviso with the remainder of section 14 we are not embarrassed by the canon of construction that additional meaning must be given, if possible, to additional language, because the conference committee (the author of the proviso) expressly declared that it was not meant to enlarge the class of foreign vessels which were to be subject to the new regulations prescribed by section 14, but only to make it clear that such foreign vessels as were already subject to the operation of section 4488 should remain subject to the new regulations. We thus have from a high source a declaration of the legislative intent.

Again, it must be remembered that this section 14 is not original or independent legislation, but purports to be a mere amendment of a preexisting section, itself always restricted to a limited class of vessels. In order that the proviso may be given a broader scope than the section amended, the legislative purpose to that effect must be clearly manifest. Thus it is said in *Sutherland on Statutory Construction*, second edition, 1904 (p. 444):

"The effect of an amendment of a section of the law is not to sever it from its relation to other sections of the law, but to give it operation in its new form as if it had been so drawn originally, treating the whole act as a harmonious entirety, with its several sections and parts mutually acting upon each other.' Where a proviso is added to a section by amendment it will be strictly construed and will be applied only to that section, unless a contrary intent is clear."

If we read the words "foreign vessels" in the proviso as meaning "all foreign vessels," this would include foreign men-of-war and foreign sailing vessels, although domestic vessels of both classes are wholly exempt from the operation of the statute. As to war vessels, such a construction would of course invite serious questions of constitutional and international law; and it would enlarge the class of vessels subject to the operation of section 4488, contrary to the declared intention of the conference committee.

This limitation of a phrase by its context is a familiar rule in statutory construction. Repeated instances occur in this seamen's bill itself of the use of the general words "a vessel," "any vessel," "no vessel," or "the vessel" (secs. 5, 9, 13, and 19), where, probably as to all, and necessarily as to some (secs. 9 and 19), the words must have a narrower meaning. So the very words "foreign vessels," which appear in section 18 of the act, are by the context in which they there appear plainly limited to "foreign vessels subject to the operation of this act."

I conclude, therefore, that the words "foreign vessels" in the proviso under discussion can only be read as "foreign vessels subject to the operation of section 4488, of which this proviso is amendatory." This reading meets the declared purpose of the conference committee; accords with the principles of construction applicable to such an amendatory proviso; and makes the amendment harmonize with the large underlying purpose (security of life) of the section on which it was imposed, and also of the act to which that section belongs.

As noted at the outset, certain "foreign private steam vessels carrying passengers" are exempt from the provisions of the act, to wit, those belonging to countries having inspection laws approximating those of the United States and possessing either unexpired certificates of inspection, or in lieu thereof sailing permits issued by the Secretary of Commerce. The scope of this exception depends, of course, on the meaning to be given to the word "approximate."

What inspection laws do and what do not "approximate" those of the United States is necessarily a mixed question of law and fact. As such, it must primarily be determined for their own guidance by the proper officers of that Department of the Government charged with the administration of these navigation laws. If their determination should be controverted by the vessel owners, the issue is one for judicial determination like any other disputed fact. Speaking generally, the term "approximation" is not synonymous with identity, but indicates merely substantial and material accord. Trivial and unsubstantial differences should be disregarded, as also requirements in the foreign laws additional to and beyond our own. The phrase also contemplates "approximation" not at the date when it was added to the law, to wit, 1902, but approximation from time to time as the inspections and voyages occur.

Questions as to the proper issuance of foreign certificates of inspection; as to whether such foreign countries accord to the steam vessels of the United States visiting those countries the same privileges as are offered in the amendment of 1902 to steam vessels of those countries visiting the United States; as to whether vessels claiming the privilege of the Secretary of Commerce under the amendment of 1906 are those operating upon regularly established lines; and as to whether such vessels will be regularly inspected by the authorities of their home government before they next return to a port of the United States—all these are of a similar nature and should be similarly resolved.

Respectfully,

T. W. GREGORY.

To the PRESIDENT.

RELIQUIDATION OF ENTRIES.

The Secretary of the Treasury has authority under section 25 of the Tariff Act of August 27, 1894 (28 Stat. 552), to direct reliquidation of certain entries covering imported merchandise, upon the basis of the rate of exchange in this country for the foreign currency specified in the invoice when the value of such currency at the prevailing rate is at least 10 per cent less than the proclaimed value.

DEPARTMENT OF JUSTICE,
September 1, 1915.

SIR: I have the honor to acknowledge receipt of your letter of June 10, 1915, in which you request my opinion on the following question:

You state that the attorneys for certain importers have requested you to reliquidate under section 25 of the Tariff Act of August 27, 1894, certain entries of goods made at New York in November and December, 1914, and January and February, 1915. These entries cover merchandise imported from Austria-Hungary on invoices certified at various dates running from October 24, 1914, to January 25, 1915, the invoice value being expressed in Austrian crowns. The reliquidation is requested upon the basis of the rate of exchange for such currency quoted in New York on the dates when the invoices were certified. You state that the collector of customs at New York has reported that at the respective times of entry the currency of these invoices was converted into money of the United States and the entries were liquidated upon the basis of \$0.203 for the Austrian crown, being the value proclaimed by the Secretary of the Treasury in T. D. 34799 and T. D. 35028, for the quarters beginning October 1, 1914, and January 1, 1915, respectively.

It appears that evidence has been produced for the purpose of satisfying you that the actual exchange value in New York of the Austrian crown on the respective dates of the certified invoices was at least 10 per cent less than the proclaimed value.

You request my opinion whether you are authorized to direct a reliquidation of the entries under consideration upon the basis of the rates of exchange in this country on

the foreign currency specified in the invoice, when the value of such currency at the prevailing rate of exchange is at least 10 per cent less than the proclaimed value.

The policy of Congress and our system of taxation as to *ad valorem* duties as shown in the various customs acts is to assess duties on imports at their actual cost, or market value, and for this purpose invoices in the currency of the country of export are required. The foreign market value or cost so stated in terms of the foreign currency must ultimately be expressed in terms of money of account of the United States; and, from the beginning, Congress has given consideration to the standard or rate at which the conversion should be made from one currency into the other. The value in United States currency of the total amount of foreign money representing the foreign market value of the goods imported is the value upon which the importer must pay the duty when the entries of the goods are liquidated in the United States.

As was said in *United States v. Whitridge* (1905), 197 U. S. 135, p. 142:

"* * * we start with the consideration that to an *ad valorem* tax it must be an object to ascertain the true value of the thing taxed at the time as of which it is taxed, and that the invoice price is referred to only to that end. The history of the statutes shows a series of continually closer approximations to it * * *."

"From the origin of the Government down to the passage of section 25 of the Tariff Act of August 27, 1894 (28 Stat. 552), the value of foreign standard coins, for the purpose of liquidating duties, was based upon their intrinsic or pure metal value, as expressed in the money of account of the United States. The method adopted previous to 1873 was by special enactment fixing the value as to certain specified coins, and by Treasury regulations as to nonenumerated coins to ascertain 'as near as may be' the intrinsic value * * *." *United States v. J. Allston Newhall & Co.*, 1899 (91 Fed. 525, 528). See also act of July 31, 1789 (1 Stat. 29); act of August 4, 1790 (1 Stat. 145, 167); act of March 2, 1799 (1 Stat. 627, 673); act of March 3, 1801 (2 Stat. 121); act of June 28, 1834 (4 Stat. 700);

act of July 27, 1842 (5 Stat. 496); act of March 3, 1843 (5 Stat. 625); act of May 22, 1846 (9 Stat. 14).

By the act of March 3, 1873 (17 Stat. 602), now R. S. 3564, instead of separate enactments for each coin, there was substituted a general law that "the value of foreign coin as expressed in the money of account of the United States shall be that of the pure metal of such coin of standard value * * * estimated annually by the Director of the Mint, and be proclaimed on the first day of January by the Secretary of the Treasury." This act was amended October 21, 1890 (26 Stat. 624), by requiring the estimate by the Director of the Mint and the proclamation by the Secretary to be made quarterly instead of annually. Under this act the value as estimated and proclaimed has the force of a statute. *Collector v. Richards*, 23 Wall. 246; *Cramer v. Arthur*, 102 U. S. 612; *Hadden v. Merritt*, 115 U. S. 25; *United States v. Klingenberg*, 153 U. S. 93.

It was later recognized, however, by Congress that the value of the money or currency of a foreign country might, in fact, differ from the value of the pure metallic contents of such money; that, in fact, certain coins in current use in foreign countries were token coins, having an arbitrary value, as a fractional currency, circulating at a certain fixed rate as compared with the standard coin of the country. It was also recognized that the value of the foreign currency or money might be affected by general commercial, financial, or business conditions, and might at times vary from the value of the pure metallic contents. Accordingly, the Tariff Act of August 27, 1894 (c. 349, sec. 25, 28 Stat. 509, 552), provided as follows:

"That the value of foreign coin as expressed in the money of account of the United States shall be that of the pure metal of such coin of standard value; and the values of the standard coins in circulation of the various nations of the world shall be estimated quarterly by the Director of the Mint, and be proclaimed by the Secretary of the Treasury immediately after the passage of this act and thereafter quarterly on the first day of January, April, July, and October in each year. And the values so proclaimed shall be followed in estimating the value of all

foreign merchandise exported to the United States during the quarter for which the value is proclaimed, and the date of the consular certification of any invoice shall, for the purposes of this section, be considered the date of exportation: *Provided*, That the Secretary of the Treasury may order the reliquidation of any entry at a different value, whenever satisfactory evidence shall be produced to him showing that the value in United States currency of the foreign money specified in the invoice was, at the date of certification, at least ten per centum more or less than the value proclaimed during the quarter in which the consular certification occurred."

This section, down to the proviso, was substantially a reenactment of the previous law. In construing this proviso, the Supreme Court, in *United States v. Whitridge* (1905), 197 U. S. 135, held that when the Secretary of the Treasury had satisfactory evidence that the value of the Indian rupee was at least 10 per cent more than the value proclaimed, "he is authorized to order a reliquidation in order to make the value in United States currency correspond with the actual value of the goods"; and it was held that the words in the proviso, "value in United States currency of the foreign money specified in the invoice," on the basis of which the Secretary might reliquidate, meant its value either as a fraction of the English pound or its exchange market value, and not value of the pure metallic contents of the foreign money. While the court strictly confined its decision to the facts of the case before it, saying (p. 144):

"But, as in this case, the exchange value and the value as a fraction of a pound were the same, it does not matter to our decision whether we say that in such circumstances the action of the Secretary was conclusive or say that it was right," it is clear that it recognized the authority of the Secretary to accept the exchange value of the rupee as his basis of reliquidation, on such evidence as he found satisfactory. In that case the reliquidation was made on the basis of the value of the rupee as stated in the consular certificate; that is, the exchange value of the rupee at the date of the invoice (which by the statute was made the

date of exportation) and at the place where the invoice was certified.

Foreign money has a commercial market value which is ordinarily denoted by the term "exchange value," changes in which may be effected by international monetary conditions, interest rates, and the balance between the credits and debits resulting from the commercial transactions of one country with another. Ordinarily, also, this exchange value of foreign money varies within certain definite limits, inasmuch as the premium on exchange will not usually reach a higher point than the cost of shipping bullion, including insurance thereon and other charges to settle the debt in the importing country. Conditions may arise, however, when the fluctuations in the rate of the exchange may be much higher than ordinary, and when the value of the foreign money may vary even as much as 10 per cent from the standard or proclaimed value.

In my opinion, it was the intent of Congress, if such conditions arise, to enable the Secretary of the Treasury, through the proviso in the act of 1894, to reliquidate entries of merchandise upon satisfactory evidence produced to him of the market value in United States currency of the foreign money specified in the invoice at the place and date of invoice. It is entirely discretionary with the Secretary of the Treasury to determine what he shall accept as "satisfactory evidence." He is authorized, if he sees fit, although not compelled, to accept the exchange value in New York of a foreign coin as evidence of its value in United States currency at the place and date of invoice. Examination of precedents in the Treasury Department discloses that the Secretary of the Treasury has ordered reliquidations under the act of 1894 on the following evidence:

1897—Indian rupee (T. D. 18110): "As the evidence of actual value contained in the certification of the United States consular officer on the invoices submitted;"

1900—Persian kran (T. D. 22084): "Examination of the papers and other evidence at hand;"

1900—Ecuadorian sucre (T. D. 21990): "Official sources;"

1901—Azorean milreis (T. D. 22747): "From an investigation of the matter and from certain advices received from the United States consul at St. Michael;"

1905—Indian rupee (T. D. 26570—G. A. 6093): Following *United States v. Whitridge*;

1910—Persian kran (T. D. 31079): "Satisfactory evidence."

The result thus reached seems to me to be not only in accord with the intent of Congress, but also equitable. The importer ought to pay for his goods and to pay his taxes upon these goods upon the same basis of monetary value. At the same time, in the administration and collection of customs taxes, it is impracticable for collectors of customs to regard the ordinary fluctuations in exchange. Congress has recognized, however, that if the market value of foreign money reaches a point when such money is worth 10 per cent more or less than the proclaimed pure metal value of the coin, relief should be given. This relief accrues to the benefit of importers when the foreign money becomes worth less, and to the benefit of the Government when it becomes worth more, than the 10 per cent limit fixed in the statute.

I desire to point out that certain of the entries contained in the letters which you have transmitted to me from the attorneys of importers do not seem yet to have been liquidated by the collector of customs. With reference to these entries, of course, no question can arise as to your present authority to reliquidate; inasmuch as it seems to have been held by the courts that whatever the authority of the Secretary of the Treasury may be, the collector of customs must liquidate all entries at the proclaimed value of the foreign coins, before the Secretary can take into cognizance the 10 per cent clause of the act of 1894, in order to authorize a reliquidation. See *United States v. Beebe*, C. C. A., 1st Cir., 1901, 106 Fed. 75 (certiorari refused, 180 U. S. 640); see also (1905) T. D. 26571, G. A. 6094.

While, therefore, I answer your question by stating that, in my opinion, you have authority under the statute to direct the reliquidation of the entries under consideration, upon the basis of the rate of exchange in this country

for the foreign currency specified in the invoice, when the value of such currency at the prevailing rate is at least 10 per cent less than the proclaimed value, I do not mean to intimate that I consider that, upon the facts stated by you, you necessarily must proceed under the act of August 27, 1894.

Respectfully,

JOHN W. DAVIS,
Acting Attorney General.

TO THE SECRETARY OF THE TREASURY.

FEDERAL RESERVE NOTES—PENALTY ENVELOPES.

The Federal Reserve Act of December 23, 1913 (38 Stat. 267) prohibits sending Federal reserve notes through the mails under penalty envelopes or labels by the members of the Federal Reserve Board.

DEPARTMENT OF JUSTICE,
October 5, 1915.

SIR: I have the honor to acknowledge your letter of August 24, 1915, wherein you request my opinion as to whether Federal reserve notes can be sent through the mails under penalty envelopes or labels by the members of the Federal Reserve Board.

The solution of the question depends alone upon the correct interpretation of the act of December 23, 1913 (38 Stat. 267), commonly referred to as the Federal Reserve Act, the material portion whereof reads:

“When such (Federal reserve) notes have been prepared, they shall be deposited in the Treasury, or in the subtreasury or mint of the United States nearest the place of business of each Federal reserve bank and shall be held for the use of such bank subject to the order of the Comptroller of the Currency for their delivery, as provided by this act. * * *, and the expenses necessarily incurred in executing the laws relating to the procuring of such notes, and all other expenses incidental to their issue and retirement, shall be paid by the Federal reserve banks, and the Federal Reserve Board shall include in its estimate of expenses levied against the Federal reserve banks a sufficient amount to cover the expenses herein provided for.”

This language plainly imposes upon the Federal reserve banks all expenses involved in the procurement, issuance and retirement of Federal reserve notes. As the shipment of these notes to the subtreasury, etc., and ultimately to the bank applying for them, is necessarily a step precedent to their issuance, it follows that the expense of such shipment is one "incidental to their (the notes) issue," and under the terms of the act must be borne by the banks.

Numerous other provisions of the act, not necessary to be here set forth in detail, manifest the purpose of Congress to impose upon the banks all expenses connected with its administration.

Having reached the conclusion that the Federal Reserve Act imposes the expense of shipment upon the reserve banks, I deem it unnecessary to pass upon the additional reason assigned by your solicitor, viz: that these notes do not relate "exclusively to the business of the United States," and, therefore, regardless of the Federal Reserve Act, could not enjoy the benefit of the free carriage provision of the act of March 3, 1877 (19 Stat. 319, 335).

Respectfully,

T. W. GREGORY.

To the POSTMASTER GENERAL.

REVOCATION OF ORDER OF DISMISSAL OF MIDSHIPMAN.

The President is unauthorized to reopen the case of a midshipman who has been dismissed from the Naval Academy with a view to revoking the order of dismissal and reinstating him.

DEPARTMENT OF JUSTICE,

October 15, 1915.

SIR: I have the honor to acknowledge your letter of the 2d instant, wherein you request my opinion whether the President may reopen the case of a midshipman who has been dismissed from the Naval Academy, and if the evidence so warrants, thereafter revoke the order of dismissal, and reinstate him. The question, so far as it requires administrative action by you, arises in the case of former Midshipman C. C. Gill, who, for certain misconduct, was recommended for dismissal by the Superintendent of the

Naval Academy, which recommendation was approved by the President, and notification of dismissal communicated to Mr. Gill by you. It further appears that the Congressman for the district from which Mr. Gill was appointed was notified by you, pursuant to the act of June 29, 1906 (34 Stat. 578), of the vacancy created by the dismissal.

The precise question submitted by you was answered in the negative in an opinion rendered to your predecessor on April 2, 1906 (25 Op. 579, 581), in the case of John Paul Bean. The following excerpt from that opinion sets forth the applicable rule:

"The authorities are overwhelming to the effect that an officer who has resigned or been dismissed can not be restored to the service except by reappointment. There are certain exceptions founded in legal disability where a resignation has not actually or conclusively taken effect, but they do not touch the present case, which is one of dismissal for cause and not resignation, wherein there was no disability and nothing inconclusive. (*Mimmack v. United States*, 97 U. S. 426; 12 Opin. 555, citing and distinguishing 6 Opin. 456; 10 Opin. 229; *United States v. Corson*, 114 U. S. 619; 4 Opin. 274; *id.* 306; cf. unpublished opinion of January 13, 1876, holding that a pardon by the President could not operate to reinstate a dismissed cadet; opinion recalled for reasons stated in 15 Opin. 80.)

"In accordance with this line of authorities, it was held by Attorney General Miller in the opinion which I first cited (19 Opin. 351) that the resignation of a 'naval cadet' could not be recalled except by reappointment. On the same grounds I am constrained to hold that the power of the Secretary of the Navy to appoint and dismiss a midshipman does not embrace the authority to reinstate, and the opinion of Attorney General Miller is therefore affirmed and extended to the case of dismissal for misconduct."

No subsequent legislation or decision requires a departure from that opinion, and as it, in my judgment, correctly states the law, I have the honor to advise that the case of Mr. Gill may not be reopened with a view to his reinstatement.

There is nothing contrary to the conclusion here reached, in the unpublished manuscript opinion of former Attorney General Jenks, rendered to the President August 14, 1888, to which you direct my attention. In the cases then under consideration, dismissal had not been consummated, and this fact was specifically made one of the grounds for the conclusion reached. The opinion, when correctly analyzed, is not out of harmony with the views herein expressed.

Respectfully,

T. W. GREGORY.

To the SECRETARY OF THE NAVY.

SAINT MARYS RIVER.

The authority granted to the Secretary of War by section 7 of the act of March 4, 1915 (38 Stat. 1053), to define and establish anchorage areas in waters generally, does not divest the Secretary of Commerce of the specific authority granted him by the act of April 26, 1906 (34 Stat. 136), to regulate the movement and anchorage of vessels in the St. Marys River.

DEPARTMENT OF JUSTICE,

October 16, 1915.

SIR: I have the honor to acknowledge your letter of August 26, 1915, wherein you ask my opinion as to whether section 7 of the act of March 4, 1915, known as the River and Harbor Act (38 Stat. 1053), transferred to the Secretary of War certain powers which had theretofore been vested in your Department by the provisions of the St. Marys River act of April 26, 1906 (34 Stat. 136), which latter act reads as follows:

"That the Secretary of Commerce and Labor be, and he hereby is, authorized and directed to adopt and prescribe suitable rules and regulations governing the *movements and anchorage of vessels* and rafts in Saint Marys River from Point Iroquois, on Lake Superior, to Point Detour, on Lake Huron, and for the purpose of enforcing the observance of such regulations the Secretary of the Treasury is hereby authorized to detail one or more revenue cutters for duty upon the request of the Secretary of Commerce and Labor on said river.

"SEC. 2. That section three of the act of March sixth, eighteen hundred and ninety-six, aforesaid, be, and hereby is, amended to read as follows:

"SEC. 3. That in the event of the violation of any such regulations or rules of the Secretary of Commerce and Labor by the owners, master, or person in charge of such vessel, such owners, masters, or person in charge shall be liable to a penalty not exceeding two hundred dollars: *Provided*, That the Secretary of Commerce and Labor may remit said fine on such terms as he may prescribe: *Provided also*, That nothing in this act shall be construed to amend or repeal the act entitled 'An act to regulate navigation on the Great Lakes and their connecting and tributary waters as far east as Montreal,' approved February eight, eighteen hundred and ninety-five."

Section 7 of the act of March 4, 1915, reads as follows:

"SEC. 7. That the Secretary of War is hereby authorized, empowered and directed *to define and establish anchorage grounds* for vessels in all harbors, rivers, bays, and other navigable waters of the United States whenever it is manifest to the said Secretary that the maritime or commercial interests of the United States require such *anchorage grounds for safe navigation* and the *establishment of such anchorage grounds* shall have been recommended by the Chief of Engineers, and to *adopt suitable rules and regulations in relation thereto*; and such rules and regulations shall be enforced by the Revenue-Cutter Service under the direction of the Secretary of the Treasury: *Provided*, That at ports or places where there is no revenue cutter available such rules and regulations may be enforced by the Chief of Engineers under the direction of the Secretary of War. In the event of the violation of any such rules and regulations by the owner, master, or person in charge of any vessel, such owner, master, or person in charge of such vessel shall be liable to a penalty of \$100.00; and the said vessel may be holden for the payment of such penalty, and may be seized and proceeded against summarily by libel for the recovery of the same in any United States district court for the district within

which such vessel may be, and in the name of the officer designated by the Secretary of War."

These two acts should be read so as not to conflict, if such a reading will not produce unreasonable results. In my opinion, each act confers an independent nonconflicting power. The former was intended to and did relate to the *movement and anchorage* of vessels in the Saint Marys River, while the latter involved the *establishment and definition of anchorage areas* in waters generally; but had no purpose to divest the Secretary of Commerce of the specific authority granted him by the former, to regulate *the movement and anchorage* of vessels in that one river.

Whether the St. Marys River act lodged *an implied authority* in the Secretary of Commerce *to establish and define anchorage grounds* in that river, or whether such power has been exercised by him, is of no present importance, since it must be apparent that section 7, *supra*, operated to withdraw any such possible authority from the Secretary of Commerce, and to bestow it exclusively on the Secretary of War.

In my opinion, the respective jurisdictions of the two departments under these acts can be worked out through the exercise by each department of its own particular powers, having due regard to the nonconflicting jurisdiction of the other.

Until this shall have been attempted, there can be no real conflict. If after such an attempt it appears impossible to achieve nonconflicting regulations, I shall be glad to express my opinion as to whether *specific conflicting regulations* constitute an exercise of the one power or of the other.

Respectfully,

T. W. GREGORY.

To the SECRETARY OF COMMERCE.

BILIBID PRISON AT MANILA.

The Philippine Islands are a Territory within the meaning of section 5546 of the Revised Statutes, as amended, and as there is no suitable prison at Shanghai, China, for the confinement of convicts sentenced to imprisonment for long terms, the Bilibid Prison at Manila will therefore be designated as the place of confinement for United States prisoners who have been or may be in future convicted and sentenced by the United States court for China, at Shanghai, to terms of imprisonment exceeding three years.

DEPARTMENT OF JUSTICE,
October 28, 1915.

SIR: I have the honor to acknowledge receipt of your letter of September 28, 1915, requesting a reconsideration of the question involved in an opinion rendered by the Attorney General December 29, 1902 (24 Op. 549), where it was held that the Philippine Islands are not a Territory within the meaning of section 5546 of the Revised Statutes, and that the Attorney General might not designate a penitentiary there for the confinement of persons convicted of crime in United States courts.

The material portion of section 5546, as amended March 3, 1901 (31 Stat. 1451), is as follows:

"All persons who have been, or who may hereafter be, convicted of crime by any court of the United States, including consular courts, whose punishment is imprisonment in a District or Territory or country where, at the time of conviction or at any time during the term of imprisonment, there may be no penitentiary or jail suitable for the confinement of convicts, or available therefor, shall be confined during the term for which they have been or may be sentenced, or during the residue of said term, in some suitable jail or penitentiary in a convenient State or Territory, to be designated by the Attorney General. * * *"

It appears that the particular case which has given rise to your request is as follows:

Certain persons, who had been convicted of crime in the United States court for China, at Shanghai, and sentenced to imprisonment, were committed to the prison for American convicts at Shanghai. On March 12, 1915, the judge of said court wrote to this department, stating that the

prison at Shanghai was unsuitable for long-term prisoners, being small, excessively hot in summer, and cold in winter, and requested that the Bilibid Prison at Manila, in the Philippine Islands, be designated as the place of confinement for the prisoners then incarcerated at Shanghai, and persons who might thereafter be convicted of crime in the United States court for China and sentenced to imprisonment. Accordingly such designation was made, and the prisoners at Shanghai were transferred to the Bilibid Prison at Manila, where they now are. On July 16, 1915, however, the Attorney General revoked the designation of the Bilibid Prison. Reconsideration of this action and the grounds on which it was based is now asked.

It appears that since the year 1902, when Attorney General Knox rendered the opinion above referred to (24 Op. 549), the legal and political status of the territorial possessions of the United States has been the subject of several decisions by the Supreme Court. These decisions, the benefit of which Attorney General Knox did not have in making his construction of Revised Statutes, section 5546, lead me to differ from the construction so placed by him.

In *Kopel v. Bingham* (1909) (211 U. S. 468, 476), Porto Rico, "although not a Territory incorporated into the United States," has been held to be "a completely organized Territory" within the meaning of section 5278 of the Revised Statutes, providing for the surrender of fugitive criminals by the executive authority "of any State or Territory" to which such criminal might have fled.

In *American Railroad Company of Porto Rico v. Dickson* (1913) (227 U. S. 145), it has been held that the Federal Safety Appliance Act of March 2, 1903 (32 Stat. 943), which by its terms applied to "common carriers by railroad in the Territories and the District of Columbia," was in force in Porto Rico, the organization of which was said to be (p. 148) "in most essentials that of those political entities known as Territories. It has a territorial legislature and a territorial system of courts."

As in the case of other Territories of the United States, it has been held that the island Territories of Hawaii and Porto Rico can not be sued without their consent. (*Ka-*

wananakoa v. Polyblank (1907) (205 U. S. 349, 353); *Porto Rico v. Rosaly* (1913) (227 U. S. 270).)

As to the Philippines, Chief Justice White, states in *Rasmussen v. United States* (1905) (197 U. S. 516, 520, 521), that it was decided in *Dorr v. United States* (1904) (195 U. S. 138) that:

"* * * whilst by the treaty with Spain the Philippine Islands had come under the sovereignty of the United States, and were subject to its control as a dependency or possession, those islands had not been incorporated into the United States as a part thereof.

* * * * *

"We are brought then to determine whether Alaska has been incorporated into the United States as a part thereof, or is simply held, as the Philippine Islands are held, under the sovereignty of the United States as a possession or dependency."

While, like Porto Rico, the Philippine Islands are not incorporated in the United States, they clearly are territory of the United States, and, to the extent that Congress has assumed to legislate for them, they have been granted a form of Territorial government, and to this extent are a Territory. Though their form of government is not identical with that of Porto Rico, the reasoning of the opinions in the cases *supra* holding that, for certain purposes, Porto Rico is to be deemed a Territory, as that word is used in various Federal statutes, is equally applicable to the Philippine Islands. Revised Statutes, section 5546, draws no distinction between an "organized" or "unorganized," "incorporated" or "unincorporated," Territory. Considering the purpose for which it was enacted, and the convenience of administration of the prison laws which it was intended to promote, I see no reason why the term "Territory" should not be given a broad construction in order to effectuate the evident ends of the statute.

That the Philippines, if a Territory within the meaning of the statute, are convenient, is unquestionable; for they are nearer to China than any other place, subject to the jurisdiction of the United States, to which these prisoners

might be sent. It is equally clear, from the facts stated by the judge, that the prison at Shanghai is not "suitable" for the confinement of convicts sentenced to imprisonment for long terms.

The Bilibid Prison at Manila will, therefore, be redesignated as the place of confinement for United States prisoners who have been or may be in future convicted and sentenced by the United States court for China, at Shanghai, to terms of imprisonment exceeding three months.

Respectfully,

T. W. GREGORY.

To the SECRETARY OF WAR.

GETTYSBURG NATIONAL PARK—ARRESTS.

Employees of the Gettysburg National Park are authorized, under the act of February 6, 1905 (33 Stat. 700), to make arrests for the violation of the laws and regulations relating to said park.

DEPARTMENT OF JUSTICE,

October 29, 1915.

SIR: I have the honor to acknowledge receipt of your two letters of October 1 and 14, 1915, respectively, wherein you request my opinion as to whether employees of the Gettysburg National Park are authorized to make arrests under the act of February 6, 1905 (33 Stat. 700), reading:

"All persons employed in the forest reserve and national park service of the United States shall have authority to make arrests for the violation of the laws and regulations relating to the forest reserves and national parks," etc.

No reason appears as to why the above language should not include employees of this particular park. It is in charge of the Secretary of War, who, in behalf of the United States, hires the service of these employees. (Act of Feb. 11, 1895; 28 Stat. 651.) The language carries its own plain meaning. It needs no interpretation. Black on Interpretation of Laws (p. 35); *United States v. Goldenburg* (168 U. S. 103). The phrase "all persons employed" may not be read as less than all.

In *United States v. Portale* (235 U. S. 27), it is said:

"We see no sufficient reason for the limitation thus read into the generality and literal meaning of the words of the act. * * * The requirement is that 'every person' harboring a woman as above, shall file the statement" (p. 30).

Were the language doubtful so as to require interpretation, the legislative history of the act would set the matter at rest.

Attorney General Griggs on June 13, 1899, advised the Secretary of the Interior that legislation was needed to confer a power to arrest upon forest rangers and supervisors. (22 Op. 512, 514.) H. R. No. 7296 was introduced to remedy this omission both as to forest reserves and as to national parks. The Committee on Public Lands, in reporting this bill, which was later enacted as the present law, said:

"In accordance with this opinion of the Attorney General this bill makes provisions for such arrests in cases of parties found violating the laws or regulations governing forest reserves. *The provisions of the bill have for like reasons been made to apply equally to national parks.*" (Vol. 7, H. Rept. No. 2345, 58th Cong., 2d sess.)

Moreover, the Gettysburg National Park is a military park, and so subject to the operation of the act of March 3, 1897 (29 Stat. 621). This act, after providing for the punishment of persons hunting, trapping, injuring monuments, vegetable growths, etc., within military national parks, authorizes—

"the superintendent or any guardian of such park * * * to arrest forthwith any person engaged or who may have been engaged in committing any misdemeanor named in this act."

It is my opinion that the employees of this particular park are fully authorized to make arrests of the kind referred to.

Respectfully,

T. W. GREGORY.

To the SECRETARY OF WAR.

MUNITIONS OF WAR—EMPTY CARS AND COAL.

Ordinary empty cars belonging to Mexican railways are not "munitions of war" within the meaning of the President's proclamation of October 19, 1915, prohibiting the exportation of such munitions into Mexico.

Coal and coke are not included in the term "munitions of war" as used in the President's proclamation of October 19, 1915.

There is no authority of law (other than the quarantine act) forbidding the importation of cattle and other live stock from Mexican territory occupied by the revolutionists, the proceeds of which would be used to continue revolutionary activities.

DEPARTMENT OF JUSTICE,
November 18, 1915.

SIR: I acknowledge receipt of yours of the 4th requesting an opinion with reference to the interpretation to be put on the term "munitions of war" as used in the President's proclamation of October 19, 1915 (39 Stat. 1756), prohibiting the exportation of such munitions into Mexico. The request involves a reconsideration of several former expressions of opinion by the Attorney General.

Your first question is—

"Can empty cars belonging to the National Railway of Mexico, or to other Mexican railways, brought over from Juarez, be detained at El Paso as munitions of war? These cars, if allowed to return would afford convenient transportation to the parties in rebellion against the recognized *de facto* Government of Mexico."

From the above I understand that these cars are ordinary railroad cars, owned by private corporations, and are not being claimed or used by armed forces operating against the *de facto* Government of Mexico, but that they might be so used for transportation purposes in case they were allowed to return. They do not appear to be of a type adapted only to military use; or to have been collected in such a way as to indicate that they were intended for military purposes alone, or for military purposes at all; or to be destined to a military depot or organization of the parties in rebellion against the recognized *de facto* Government of Mexico.

I am of the opinion that these cars do not constitute munitions of war, and I, therefore, answer your first ques-

tion in the negative. The cases of *United States v. Barber* (9 Cranch 243) and *United States v. Sheldon* (2 Wheat. 119) should not be treated as expanding the meaning of the phrase "munitions of war." In both of these cases the statute under consideration forbade the transportation to Canada of "naval or military stores, arms or munitions of war, or *any articles of provision.*" In the first case referred to the court certified its opinion that fat cattle were provisions or munitions of war within the true intent and meaning of the act. In the second case the court expressed the opinion that the cattle were "articles of provision *and* munitions of war." In either case it was sufficient to find that the cattle were articles of provision. Neither decision discusses the general scope of the phrase "munitions of war" and neither can be fairly treated as fixing an interpretation of that phrase.

Your second question is—

"Can coal and coke destined for use by any faction in rebellion against the *de facto* Government of Mexico, or for use in the territory of the rebellious faction, and which could, therefore, be easily requisitioned by it, be classed as munitions of war? Such coal would be used to operate trains in the military movements of those in revolt against the *de facto* Government, and the coke would be used to operate American-owned smelters which would probably be damaged beyond repair because of the inexperience of the revolutionary operatives."

The original joint resolution of April 22, 1898 (30 Stat. 739) of which the joint resolution of March 14, 1912 (37 Stat. 630), was an amendment, prohibited the export "of coal or other material used in war from any seaport of the United States"; and in the debates (see 55th Cong., 2d sess., vol. 31, p. 4146, *et seq.*), in the Senate, the phrase "other material used in war" was apparently deemed to be synonymous with "munitions of war." See the following colloquy in the Senate:

"MR. CAFFERY. I inquire of the Senator from Connecticut whether it could not specify the articles the exportation of which shall be prohibited?

"MR. HAWLEY. It would be very difficult. There might have been something more of description, but it is impossible to go into the minute description of fulminates and percussion caps and primers and ramrods.

"MR. CAFFERY. Suppose we say, 'Coal and munitions of war.'

"MR. JONES of Arkansas. It does practically now.

"MR. CAFFERY. Then I should be satisfied with it.

"MR. CHANDLER. I suppose it is well known what war material is. It seems to me that discretion may be safely left to the President.

"MR. CAFFERY. Does the joint resolution say 'war material'?

"MR. CHANDLER. Materials used for war.

"MR. HAWLEY. For war.

"MR. CAFFERY. Then I have nothing more to say."

When the joint resolution of 1912 was under consideration in the Senate (see Cong. Rec., 62d Cong., 2d sess., vol. 48, pp. 3257-3258) Mr. Root stated:

"MR. ROOT. This joint resolution eliminates coal. It does not apply to anything except arms and munitions of war.

"MR. SHIVELY. It really narrows the joint resolution that is the existing law.

"MR. LODGE. The existing law is broader than the joint resolution under consideration. The existing law covers coal specifically.

"MR. CHILTON. That is why I asked the question.

"MR. ROOT. The existing law is narrowed in every respect but one; and that is, it is applied not only to exportations from seaports, but from inland places."

From the above, it is evident that coal was not intended to be included, and I therefore answer your second question in the negative.

Your third question is whether—

"* * * there is any authority of law that could be invoked to prohibit' the importation of cattle and other live stock from 'territory occupied by the revolutionists, the proceeds of which would be used to continue revolutionary activities.'"

You state that this ruling is desired to cover confiscated or stolen live stock or stock that is shipped by, or in the interest of, those involved in the continuance of revolutionary conditions in the Republic of Mexico. I know of no present authority of law (other than the quarantine act) under which the importation of this live stock could be forbidden. The real owners could, of course, assert their rights to it in the courts which acquired jurisdiction over the property.

Respectfully,

T. W. GREGORY.

To the SECRETARY OF STATE.

GOVERNMENT-OWNED SITE AT AQUEDUCT BRIDGE.

The Government-owned site at the south end of the Aqueduct Bridge, comprising the tract above high-water mark on the Virginia bank of the Potomac River purchased under the act of June 21, 1886 (24 Stat. 84), is under the administrative control and jurisdiction of the Secretary of War.

The Secretary of War has the power to issue a revocable license to the Washington, Arlington & Falls Church Railroad Co., permitting it to occupy with its railroad tracks and appurtenances such portion of said site and in such manner as he may deem advisable for the time being.

The Secretary of War also has the power to issue a revocable license permitting the relocation of the track of the Great Falls & Old Dominion Railroad Co. upon the site in question.

DEPARTMENT OF JUSTICE,

November 19, 1915.

SIR: With a view to determining whether revocable licenses may be issued for the relocation of the railway tracks of the Great Falls & Old Dominion Railroad Co. and of the Washington, Arlington & Falls Church Railroad Co. on the Government-owned site at the south end of the Aqueduct Bridge, in accordance with a plan recommended by a Board of Engineers, you have asked my opinion upon the following questions concerning your authority in the premises:

"1. Is the Government-owned site at the south end of the Aqueduct Bridge under the administrative control and jurisdiction of the Secretary of War?

"And if this question be answered in the affirmative, then the following:

"2. May the Secretary of War, by revocable license or in other like manner, authorize, or do anything tantamount to authorizing, the Washington, Arlington and Falls Church Railroad Company to occupy indefinitely said site with its railroad and its appurtenant properties; or should said company be remitted for its right of occupancy to Congress?

"3. Has the Secretary of War the authority to change or relocate, by way of selecting another place for its tracks for the purpose of improving transportation facilities at the site in question, the right of way now occupied by the Great Falls and Old Dominion Railroad Company?"

As the answer to your first question may render consideration of the others unnecessary, it is proposed to treat it as an independent subject. The facts out of which it arises are not fully stated in your letter. Some of them are to be found, *passim*, in the opinion of the Judge Advocate General, which accompanies it. In the course of this opinion reference will be made to certain other facts of which, perhaps, a court would take judicial notice. It is to be noted, especially, that the tract described in your letter simply as the Government-owned site is assumed to be the tract of upland, comprising 5.2418 acres, above high-water mark on the Virginia, or southern, bank of the Potomac River, purchased under the act of June 21, 1886, and not to include any land formed by reclamation out of the former bed of the river below high-water mark.

The site in question was formerly the property of the Alexandria Canal Co. and was used in connection with the canal which crossed the Potomac upon the stone piers and abutments now supporting the Aqueduct Bridge. In conformity with the act of Congress of July 27, 1868, chapter 261 (15 Stat. 231), that company's successor, the Alexandria Canal, Railroad & Bridge Co., erected over the former aqueduct a wooden bridge, which, from high-

water mark on the Virginia shore, was continued by an elevated structure some 600 feet in length to the level ground in Virginia.

In a suit brought in the Supreme Court of the District of Columbia to enjoin a sale for nonpayment of taxes assessed on the bridge structure as a whole, it was held by the court in general term that so much of the bridge as extended from Georgetown to the high-water mark on the Virginia shore was in the District of Columbia, but that so much as extended from the high-water mark to the level ground in Virginia was not within the District, and the assessment, being upon the whole, was accordingly void. (*Alexandria Canal, Railroad & Bridge Co. v. District of Columbia*, 1 Mack. (D. C.) 217.)

The act of June 21, 1886 (24 Stat. c. 463, p. 84-85), authorized the Secretary of War to acquire by purchase—

“ * * * a title in fee-simple, free from all liens or claims of lessees or others, to the bridge known as the Aqueduct Bridge, including the piers thereof, across the Potomac River, and the approaches thereto, and all the rights and franchises connected with said bridge.”

and, when acquired, to repair or reconstruct the same. The act further provided that—

“ * * * one-half of the expense of such purchase and reconstruction or repair of said bridge shall be charged to and paid by the District of Columbia, and the balance, one-half of the sum so expended, shall be paid out of the Treasury of the United States.”

The Secretary of War accordingly purchased the whole property, including the piers, approaches and franchises, taking on behalf of the United States a conveyance in which was expressly named “also the whole of the land at the south end of the said bridge containing 5 acres, more or less.” Cession of jurisdiction had meanwhile been made by Virginia by an act (Mar. 6, 1886, Session Laws 1885-86, p. 483), which purported to retain in the State “concurrent jurisdiction.”

In pursuance of the act, the Secretary of War removed the former wooden structure and erected a new iron bridge upon the existing stone piers and abutments. It was

opened as a free bridge on March 3, 1888, control, however, remaining with the Secretary of War.

The act of July 18, 1888 (25 Stat. c. 676, p. 314), making appropriations for the government of the District of Columbia, contained the following provision (p. 319):

“Care of bridges: For ordinary care of bridges, including keepers, oil, lamps, and matches, two thousand five hundred dollars; for construction and repairs of bridges, including retaining wall on M Street at the approach to the new free bridge across the Potomac, which bridge is hereby placed under the jurisdiction of the Commissioners of the District of Columbia, fourteen thousand five hundred dollars; in all, seventeen thousand dollars.”

From that time the Commissioners have had the control, care, and maintenance, as well as the policing, of the bridge structure, but they do not seem to have exercised any powers whatever in respect of the tract of land above high-water mark on the Virginia shore, in which are located the southern approaches to the bridge.

On the contrary, it appears from the opinion of the Judge Advocate General that, beginning about 1895, the Secretary of War issued a series of revocable licenses under which the occupancy of designated portions of the site by the tracks of the Washington, Arlington & Falls Church Railroad Co. began and still continues.

By the act of January 29, 1903 (32 Stat. 781), provision was made for the first time for the use of the bridge itself by electric street-railway tracks. Upon compliance by the Great Falls & Old Dominion Railroad Co. with certain conditions therein stated, the Commissioners were authorized and directed to alter the superstructure at the company's cost in such manner that a single electric street-railway track might be placed thereon. Default on the part of the company named operated to forfeit the rights, privileges, and franchises conferred by the act and to vest them, upon like conditions, in the Washington, Arlington & Falls Church Railroad Co. Upon completion of the alterations in the bridge, or earlier if the Commissioners should direct, the first-named company was authorized “under such regulations and upon such plans as may be

approved by said Commissioners, to lay upon said bridge and across "certain specified streets in the city the single electric railway and to connect therewith "its tracks to be constructed over its right of way in Alexandria County, Virginia." Provision was also made for the use of the tracks "for the purpose of crossing said bridge and securing connection into the city of Washington" by one or more other railway companies upon satisfying the Commissioners that it had refunded a proportional part of the cost of the work as might be agreed upon between the companies as equitable compensation for the privilege. Upon failure to agree, the Supreme Court of the District was empowered to determine the amount. The company using the track was required to "keep the bridge floor and the pavement between the rails" and for a given distance outside in repair to the satisfaction of the Commissioners who, upon failure so to do, were authorized to make the repairs and collect the cost, and upon default in payment "to prevent the operation of said cars by the exercise of their police authority."

Section 8 authorizes the Commissioners to permit the cars "across said bridge and in M and Thirty-sixth Streets to be operated by the underground electric system or by overhead trolley, as they may deem desirable." Then appears the following:

"SEC. 9. That the operation of the cars upon the track herein authorized shall be under the direction and control of the Commissioners of the District of Columbia, who are hereby authorized to make such regulations in regard to speed, character, and weight of cars, time of operation, and fare to be charged as they may deem necessary or desirable; and any company violating any regulations of said Commissioners made under the authority of this section shall be subject to a fine of not less than twenty-five dollars for each and every offense, to be recovered in any court of competent jurisdiction at the suit of said Commissioners, and in default of the payment of such fine the Commissioners are hereby authorized to exercise their police authority to prevent the operation of the cars of the company so defaulting."

The Great Falls & Old Dominion Railroad Co. accepted the provisions of the act and made the required deposit. The bridge superstructure was changed or rebuilt by the Commissioners and, under their supervision and in accordance with plans approved by them, the company laid across the bridge and on M Street the single electric track authorized by the statute. But it seems that the location on the site in question of the track connecting the bridge track with the company's right of way in Alexandria County was approved by the Secretary of War. (Military Reservations, Call, 1910, p. 396.)

1. Is the site under the administrative control and jurisdiction of the Secretary of War? This amounts to asking whether it is within the jurisdiction of the Commissioners of the District of Columbia, for these two are the only competing jurisdictions. Nothing else is suggested to take the site out of the normal control of the Secretary of War.

This suggestion seems, when analyzed, to resolve itself into three distinct propositions:

(a) That the site is within the District of Columbia in the sense, at least, that, by virtue of an extension of their powers, it is within the general governmental jurisdiction of the Commissioners of that District.

(b) That it is within the jurisdiction of the Commissioners because it is an appurtenance of the Aqueduct Bridge which, by the act of July 18, 1888 (25 Stat. 314), was placed under their jurisdiction.

(c) That it is within the jurisdiction of the Commissioners because, by the act of January 29, 1903 (32 Stat. 781), they were given certain powers with respect to the location of the tracks of the Great Falls & Old Dominion Railroad Co. across the Aqueduct Bridge.

(a) Starting with the settled proposition that, prior to the purchase, the approaches to the bridge on the Virginia side, and *a fortiori* the soil on which they rested, were within the State of Virginia (*Alex. Canal R. & B. Co. v. District of Columbia, supra*), the present phase of the inquiry reduces itself to this: Did the purchase of this land, in connection with the purchase of the bridge, by the Sec-

retary of War on behalf of the United States, followed by the placing of the bridge under the "jurisdiction of the Commissioners" operate to extend the limits of the District of Columbia over land formerly part of Virginia and thereby subject it to the general administrative control and jurisdiction of the Commissioners of the District in their capacity as such? Unless such be the case, any power the Commissioners may have in the premises must be an express statutory power conferred upon them as a special agency of the Federal Government.

It is believed that this question will be answered by briefly considering what the District really is and what is the legal status of its Commissioners. The District which has been named "Columbia" is defined in the Constitution. It is "such district (not exceeding ten miles square) as may, by cession of particular States, and the acceptance of Congress, become the seat of the Government of the United States." Nothing can form part of the District which does not answer that description. The cession having been made and accepted and the boundaries of the District fixed, it became a territory with defined limits. It is, moreover, a distinct, separate political community, the sovereignty of which is, absolutely and for all purposes, lodged in the United States. (*Met. Railroad Co. v. District of Columbia*, 132 U. S. p. 1, 8-9; *Geofroy v. Riggs*, 133 U. S. 258, 269). Such is its constitutional status as a distinct territory with defined boundaries, subject to the exclusive legislation of Congress.

Considered from the viewpoint of administrative organization, it is also a municipal corporation, a municipal body politic. (Act of June 20, 1874 (18 Stat. 116, c. 337); act of June 11, 1878 (20 Stat. 102, c. 180); *Met. Railroad Co. v. District of Columbia*, 132 U. S. 1, 7.)

The administration of this corporation is lodged in the Commissioners who are administrative officers with ministerial powers only. (*District of Columbia v. Bailey*, 171 U. S. 161, 176.) They are officers of a definite legal person, the municipal corporation of the District of Columbia, distinct from the Government of the United States and not

a department thereof. As such, their powers are coextensive with and confined by the limits of the municipal corporation which they administer. (*Coates v. District of Columbia*, 42 App. D. C. 194, 198.)

It is to be noted that exclusive jurisdiction over the territory constituting the seat of government is not dependent in any wise upon ownership by the United States of any portion of the land within such territory.

Now, the purchase by the Secretary of War of land in the State of Virginia for whatsoever purpose, whether for a dockyard, an arsenal, or an approach to a bridge in the District of Columbia, obviously does not, though followed by a cession from the State, constitute a cession and acceptance by Congress of Territory for the seat of government. Land owned by the United States contiguous to the District of Columbia and bought for a special purpose does not thereby become a part of the District of Columbia any more than land purchased for a similar purpose which is not contiguous to the District of Columbia. It follows, therefore, that the Commissioners of the District of Columbia, by virtue of their office, have no jurisdiction over the approaches to the bridge which lie outside the limits of the District of Columbia.

(b) Have the Commissioners jurisdiction of the site, by virtue of the provision of the act of July 18, 1888 (25 Stat. 314), by which the bridge was placed under their jurisdiction?

This provision was an item in an appropriation bill for the expenses of the government for the District of Columbia. Under the caption "Care of bridges," money was appropriated for the construction and repair of the local bridges "including retaining wall on M Street at the approach to the new free bridge across the Potomac." The interpolated general provision, "which bridge is hereby placed under the jurisdiction of the Commissioners," read with its context in the light of the nature and purposes of the act, necessarily relates to the bridge as a structure within the District of Columbia. What is the jurisdiction under which the bridge is to be placed? Clearly the juris-

diction then vested in and exercised by the Commissioners in their capacity as the administrative officers of the municipal corporation for which Congress was appropriating. The bridge had just been finished and opened to the public. So far, it had been under the control of the Secretary of War, who had purchased and rebuilt it. As a bridge in the District, Congress was now subjecting it to the jurisdiction of the officers of that District, who by the organic act (June 11, 1878, c. 180, 20 Stat. 102) were charged with submitting as part of their estimates the cost of constructing, repairing, and maintaining "all bridges authorized by law across the Potomac River within the District of Columbia." The words under consideration indicate no intention to extend the limits of the District of the seat of government, or to create the Commissioners of the District a special agency for the administration of land outside of it.

It is said that the tract of land embracing the Virginia approach to the bridge is an appurtenance to the bridge and "jurisdiction over the bridge" necessarily carries jurisdiction over the approach. But what does "jurisdiction" here mean? Not custody and maintenance only, but government and police as well. If this phrase gives the Commissioners jurisdiction over this site for one purpose, it gives jurisdiction for all purposes, the same complete jurisdiction they exercise over land within the limits of the District. This is a strong thing to do upon the mere notion of an appurtenance. While the land across the river may perhaps be said, in an engineering sense, to be an appurtenance to the bridge, it is not so in a juridical sense.

It would not have passed by a conveyance of the bridge *simpliciter*. It is against the fundamental conceptions of the common law that land should be appurtenant to land or to an adjacent structure. (*Harris v. Elliott*, 10 Pet. 26, 54; *Potomac S. Co. v. Upper P. S. Co.*, 109 U. S. 672, 685.) And the same principle must apply in a question of jurisdiction over land where there are no words to carry the land, as such.

(c) There remains to consider only the effect of the act of January 29, 1903. Does it constitute the Commissioners a special agency for the administration and control of this land outside of the limits of the District of Columbia?

It may be premised that Congress may impose upon any executive officer any duty it may think proper, consistent with the Constitution. It is conceivable that the administration of this land outside the District might be committed to the Commissioners of the District of Columbia as a superadded duty. (*McGraw v. District of Columbia*, 3 App. D. C. 405, 408.) The question is, has it done so?

The provisions of the act of January 29, 1903, have already been summarized, *supra*.

It is quite obvious that the mind of Congress is altogether directed upon two things (a) a physical structure which, together with certain streets in the District of Columbia, is to be adapted to a new transportation use, and (b) the municipal powers of the Commissioners which are to be called into play to accomplish the adaptation. The Commissioners are not only to approve the plans for the alteration of "the superstructure" so as to admit of a single electric track across the bridge, to make regulations for the work, and to determine between the underground and overhead systems "across the bridge and in M and 36th Streets," but they are invested with the continuing duty of seeing that the track, and the spaces between and beyond the rails, are kept in repair, with the power to make the repairs themselves in event of default, and with the power to coerce reimbursement of the cost by "the exercise of their police authority." To them also is committed the direction and control of the operation of the cars and the authority to make "regulations in regard to speed, character and weight of cars, time of operation and fare to be charged." For breaches of these regulations, fines, evidently to be fixed by regulations of the Commissioners themselves, are to be recovered at their suit, and here again, for default in payment, the commissioners are "authorized to exercise their police authority to prevent the operation of the cars of the company so defaulting." Can it be doubted that the spe-

cial powers conferred by this act are conferred upon them in their capacity as the administrative officers of the existing municipal corporation of the District of Columbia and are to be exercised within the existing legal and constitutional limits of that District?

Nowhere in the act is there a suggestion that the Commissioners are being constituted a special agency of the Federal Government for the administration and control of land lying beyond the limits of the District. Its subject matter is the location, upon a definite physical structure and upon certain streets, both within the District, of a single railway track by a single company. The Commissioners are given no power to authorize any other. Yet, at that moment, as for several years before, the Washington, Arlington & Falls Church Railroad Co. was occupying, by license from the Secretary of War, a part of the site in question. While the act provides that, upon default of the Great Falls & Old Dominion Co., the privileges conferred are to inure to the Washington, Arlington & Falls Church Railroad Co., it makes no reference whatever to the existence of its tracks upon the site, or to the circumstance that, if the Great Falls Co. accepted the provisions of the statute, there would be two tracks upon the site. The fact that any land intervened between the bridge and the Great Falls Co.'s right of way in Alexandria County is apparently ignored. The property with which the act deals is to be burdened only with a single track, and "connection into the city of Washington" is to be made by connecting directly with this single track the "tracks to be constructed over its right of way in Alexandria County, Virginia." That the act was framed only with the District of Columbia in view receives confirmation from the clause providing that the Supreme Court of the District of Columbia is to determine, in case of disagreement, the proportion of the cost to be borne by any company using the tracks. The conclusion is irresistible that this site in Virginia, so far as general administrative control and jurisdiction are concerned, was left by the act exactly where it found it, i. e., in the hands of the Secretary of War. And so, apparently, the business was acted upon. The location

of the Great Falls & Qld Dominion tracks on the land beyond the bridge was made by the Secretary of War.

Whether the location should have been made by the Commissioners or by the Secretary of War, however, has no real bearing upon your first question, which is simply whether you possess a general administrative control and jurisdiction over the site. The designation of the Commissioners as a special agency for the purpose of location, without more, would not operate to vest in them a general control. Such general administrative control and jurisdiction are, in my opinion, vested in you, and the first question must be answered in the affirmative.

2. Inasmuch as indefinite, in the sense of permanent, occupation is inconsistent with the conception of a revocable license the second question, as I understand it, comes to this:

Has the Secretary of War power to permit, just so long as he thinks advisable, the occupancy of this site by electric railway tracks and, therefore, to issue a revocable license or permit to that effect?

It must be conceded that no express statutory authority for such a power can be adduced. Sections 161 and 217 of the Revised Statutes giving the Secretary the custody, charge, and preservation of the property "appertaining to the Department" can hardly be said to confer direct authority to permit the temporary use of the property by others. Nor is an authority, general in its nature, to be deduced from the provisions of the act of July 5, 1884, chapter 214, section 6 (23 Stat. 103), which grants the Secretary of War express authority to permit "the extension of State, county, and Territorial roads across military reservations," the landing of ferries and the erection of bridges thereon, and the passage of live stock across the same. Nor is a power to license a temporary occupancy strictly embraced within the authority to lease for a term "not exceeding five years, and revocable at any time," such property "under his control as may not for the time be required for public use" given by the act of July 28, 1892, chapter 316 (27 Stat. 321).

But, as pointed out in 22 Op. 240, 245, the power to issue such revocable licenses, inasmuch as they vest no estate, interest, or franchise and confer no right whatever to the continuance of the permission thereby given, has been habitually exercised as an incident of the power of management and control, whenever, in the Secretary's judgment, the permission will subserve the interests of the Government. In that opinion are collected numerous instances of the granting of such revocable licenses for the use of portions of Government lands, and the opinion itself sustained the issuance of a revocable license to the Washington & Glen Echo Railway Co. to lay a single track on the Aqueduct reservation near Cabin John Bridge.

It is perhaps not too much to say, in view of this acquiescence in the practice, that Congress has in a sense recognized that the authority to permit a reservation to be crossed by a road or to be used for a ferry landing or a bridge might on occasion be extended by analogy to authorize a similar temporary occupancy by a street railway track, and that an officer given power to lease at discretion might be intrusted with the lesser power to license a temporary trespass. The inherent limitation upon it, namely, that the trespass authorized must subserve some purpose useful or beneficial to the Government itself, is one that goes to the mode of exercise rather than to the existence of the power. Whether, as in this case, the determinable occupancy of the land in question is or is not a benefit to the Government in respect of that land or in respect of other property or interests under your control is a question for the exercise of the judgment of the official vested with the power rather than a question of law to be determined in advance by the law officers of the Government. Since the occupancy permitted is, and is expressed and thoroughly understood to be, absolutely revocable and subject to termination at any time at the will of the Government, any present misapprehension as to the advantages expected from the permission can be corrected at any moment by the Secretary granting the permit or by his successor.

In the instant case, the tracks of the Washington, Arlington & Falls Church Railroad Co. appear by the opinion of the Judge Advocate General to have been on some portion of this site since 1895, under divers licenses from your predecessors. As is well known, this line affords one of the principal means of access to the national cemetery at Arlington and to the military post at Fort Myer, which otherwise would have but imperfect transportation connection with the city.

Since it appears from the papers submitted that you have in effect decided again to exercise this power (in the event that you be held to possess it), in accordance with a plan drawn up by a board of engineers and approved by you, it must be taken for granted that the permission contemplated is, in your judgment, beneficial to the Government property or interests under your charge.

It being clearly understood that such permission creates no right, interest, or franchise in the licensee, and that, however long continued, the occupancy is subject in theory and in fact to immediate termination at any time at the will of the Government, I am of opinion that you have power to issue a revocable license to the Washington, Arlington & Falls Church Railroad Co., permitting it to occupy with its railroad tracks and appurtenances such portion of the site and in such manner as you may deem advisable for the time being.

It need hardly be added that what I have said on this point has no application to a case where the use granted from its very nature would not be revocable, practically speaking, whatever it might be in form.

3. The discussion of the preceding questions has probably supplied the elements requisite to a solution of the third question which is understood to be whether you have power to permit the relocation of the track of the Great Falls & Old Dominion Railroad Co.

Holding, as I do, that you have general administrative control and jurisdiction over this site and, as an incident thereof, power to issue revocable licenses for its use as a street railway track by the Washington, Arlington & Falls Church Railroad Co., it follows that you must possess

the same power with respect to the Great Falls & Old Dominion Co., unless such general power was abridged by the act of January 29, 1903, already subjected to analysis, *supra*. While that act vested in the Commissioners of the District many continuing powers with respect to the operation of the cars across the bridge structure and the repairs to the track on the bridge and the streets, it would seem to have conferred upon them a single definite duty with respect to the alteration of the bridge and the location thereon of a single electric railway track. With respect to the bridge and M and Thirty-sixth Street, that power would appear to have been exhausted by the original exercise of it, no authority being left in the Commissioners again to alter the bridge or the location of the track thereon. (*Cf. Macfarland v. Philadelphia, B. & W. R. R. Co.*, 37 W. L. R. 129.)

It must be remembered in this connection that the Commissioners are administrative officers with merely ministerial powers, and have no authority to act which can not be gathered, directly or by obvious implication, from the terms of the statute. (*District of Columbia v. Bailey*, 171 U. S. 161, 176; *Fay v. Macfarland*, 32 App. D. C. 295, 299.)

Should we assume, for the sake of argument, that the Commissioners had a similar power of location in respect of the site on the other side of the river, that power was likewise exhausted.

But I am of opinion, for the reasons stated in the discussion of the first question, that the act of January 29, 1903, neither conferred upon the Commissioners any power with respect to the location of a track on this site nor abridge in any wise the Secretary of War's normal jurisdiction and control over the land itself. As we have already seen, the act did (sec. 4) expressly authorize the Great Falls & Old Dominion Road to connect the track across the bridge, located by the Commissioners, with "its tracks to be constructed over its right of way in Alexandria County, Virginia." If the making of such a connection involves, as it appears necessarily to do, passage across the site in question, the incidental authorization to lay a track

across the site must be also carried by the act, and the location of such a track on the ground must fall, as a matter of administrative and engineering control, to that officer of the Government who has a general and continuing administrative control and jurisdiction of the land.

As I have already held that general control and jurisdiction are vested in you and not in the Commissioners of the District, the third question must, therefore, be also answered in the affirmative.

While the act of January 29, 1903, constitutes a controlling and sufficient authorization for permitting the extension of the connecting track over this site, it must be remembered, in view of the nature of your powers in the premises, that any license you may issue for its location on any defined ground must be, in this case as in all others, a revocable permission determinable, as such, at the will of the Government.

Respectfully,

T. W. GREGORY.

To the SECRETARY OF WAR.

INDEMNITY SCHOOL LANDS.

Where there is a certification of land to a State or Territory under section 2449 of the Revised Statutes, and where no authority is otherwise given to pass title by approval of the Secretary of the Interior, the title to coal land embraced in the certified list, and known to be such at the time of the selection, remains in the United States, subject to the control and disposition of the Land Department.

The jurisdiction of the Department of the Interior over excepted mineral land can be exercised after the lapse of the limitation period prescribed in the act of March 3, 1891 (26 Stat. 1099).

DEPARTMENT OF JUSTICE,

November 19, 1915.

SIR: In your letter of August 9, 1913, you referred to a previous request of your Department to my predecessor for an opinion relative to a case of indemnity school land selected by the State of Colorado pursuant to the acts of March 3, 1875 (18 Stat. 474), and February 28, 1891 (26 Stat. 796).

The act of 1875 is the Colorado enabling act, section 7 of which provides:

"That sections numbered sixteen and thirty-six in every township, and where such sections have been sold or otherwise disposed of by any act of Congress, other lands, equivalent thereto, in legal subdivisions of not more than one quarter-section, and as contiguous as may be, are hereby granted to said State for the support of common schools."

Section 15 of the same act provides:

"That all mineral lands shall be excepted from the operation and grants of this act."

The act of 1891, amending sections 2275 and 2276 of the Revised Statutes, grants indemnity lands in lieu of school sections 16 and 36 lost by any State or Territory by reason of preemption or homestead settlements thereon before survey, or because they are mineral or included within any reservation or have been otherwise disposed of, or where the school sections are wanting by reason of fractional townships or from any natural cause whatever. Provision is made for ascertaining in advance of the surveys the school sections included in reservations, and for selection of all lieu lands by the State or Territory "from any unappropriated, surveyed public lands, not mineral in character, within the State or Territory where such losses or deficiencies of school sections occur."

There is no provision either in the Colorado grant or in the general act for the issuance of patents or other evidence of ownership of indemnity school lands, nor for any action to be taken by the Land Department for the selection, ascertainment, or identification of such lands.

Under date of January 24, 1900, the State of Colorado filed in your Department a list of indemnity school selections, in which was included a tract of 40 acres in lieu of a portion of a section numbered thirty-six of equal area which fell within the Ute Indian Reservation. Thereafter a list was prepared in the General Land Office wherein was entered the above specified selection with others not material to be considered, which list bore the following title:

"Approved list No. 4 of school indemnity lands, exhibiting the tracts of public lands situated in the district of lands subject to sale at Glenwood Springs, Colorado, which have been selected for the support of schools in certain townships and fractional townships where the full amount of school lands to which such townships are entitled have not been granted in place, and which selections are provided for in the acts of Congress approved March 3, 1875 (18 Stat. 474), and February 28, 1891, amending sections 2275 and 2276 of the Revised Statutes (26 Stat. 796)."

Upon this list the Commissioner of the General Land Office made the following certification and recommendation, dated May 21, 1902:

"It is hereby certified that the tracts described in this list are embraced in the original lists now on file in this office of lands selected by the State of Colorado pursuant to the laws of said State, in the Glenwood Springs land district, as indemnity for losses in the sections and townships named, which school land indemnity selections are authorized by the acts of Congress above cited.

"It is further certified that the lands reported lost or deficient in said list and those selected in lieu thereof, have been examined and compared with the township plats and track books in this office; that the indemnity lands claimed have been found to be properly due the townships for which they were selected; and that the selected lands are shown to be subject to such selection, being unappropriated surveyed public lands, not mineral in character, within the limits of said State, and free from adverse claims of record.

"It is therefore recommended that the said list embracing twenty-five thousand five hundred and twenty-one acres, and twenty-six hundredths of an acre, be approved subject to any valid interfering rights existing at date of selection."

To this was added the approval of the Secretary of the Interior, dated June 14, 1902, as follows:

"The foregoing list of selections, embracing twenty-five thousand five hundred and twenty-one acres and twenty-

six hundredths of an acre, is hereby approved, subject to any valid interfering rights existing at date of selection."

A copy of this list, with the foregoing certification and approval, was sent by the Commissioner to the Governor of Colorado with the following letter of transmittal, dated July 14, 1902:

"I have the honor to transmit, herewith, duly certified copy of approved list No. 4, containing 25,521.26 acres of indemnity school land selections made in the Glenwood Springs land district, the selection of which was approved June 14, 1902."

Thereafter special agents of the General Land Office made an inspection of a portion of the lands embraced in the certified list, including the 40-acre tract above specified, and reported:

"That the lands were known to be coal land at the time of the approval to the State; that coal was actually mined and shipped from said land, and that it, in fact, outcrops 10 feet in thickness upon the surface of the land, which outcrop is plainly visible for a great distance."

Thereupon the Commissioner recommended that a hearing be ordered, at which the State of Colorado and any persons claiming under it should be cited to appear, for the purpose of determining whether the tract in question was known coal land at the time of the approval and certification, in order that the Department, if the facts should justify, might correct the erroneous approval and certification by a cancellation thereof.

In this situation an opinion is desired upon the following questions:

1. Does the certification of land to a State or Territory divest the Interior Department of jurisdiction to determine the known character of the land at the date of certification where it is alleged that the land was not of the character contemplated by the act making the grant to the State or Territory?

2. In the event such certification does not divest the Department of jurisdiction, may the Department, upon its determination that the land was known mineral at and

prior to the date of certification, treat the certification as null and void and make other disposition of the land?

3. If the jurisdiction of the Department is not lost by such certification, can such jurisdiction be exercised after the lapse of the limitation period prescribed in the act of March 3, 1891?

4. If the Department is without authority to determine the foregoing questions, and proceedings must be instituted in the courts for that purpose, do the statutes of limitation mentioned apply to such certifications?

The principal question for consideration is whether title to all of the lands embraced in the list passed to the State notwithstanding one tract therein was known coal land. Coal lands are mineral lands within the meaning of the exception in the grant, but the exception is confined to mineral lands which were known to be such at the time of the selection by the State. (*Mullan v. United States*, 118 U. S. 271, 277, 278; *McCreery v. Haskell*, 119 U. S. 327, 331; *Durand v. Martin*, 120 U. S. 366, 370; *Olive Land, etc., Co., v. Olmstead*, 103 Fed. 568, 576.) Although the words of the grant are *in praesenti*, they could not operate to convey title to indemnity selections without definite ascertainment by some authorized action of the Land Department. (*Fraser v. O'Connor*, 115 U. S. 102, 104, 106; *Johanson v. Washington*, 190 U. S. 179, 182; *Humbird v. Avery*, 195 U. S. 480, 507; *Burke v. Southern Pacific R. Co.*, 234 U. S. 669, 685.)

The practice of passing title by certification of the Commissioner is authorized by the act of August 3, 1854 (10 Stat. 346), reenacted without substantial change as section 2449 of the Revised Statutes, which reads as follows:

“Where lands have been or may hereafter be granted by any law of Congress to any one of the several States and Territories, and where such law does not convey the fee-simple title of the lands, or require patents to be issued therefor, the list of such lands which have been or may hereafter be certified by the Commissioner of the General Land-Office, under the seal of his office, either as originals or copies of the originals or records shall be regarded as conveying the fee-simple of all the lands embraced in such

lists that are of the character contemplated by such act of Congress, and intended to be granted thereby; but where lands embraced in such lists are not of the character embraced by such acts of Congress, and are not intended to be granted thereby, the lists, so far as these lands are concerned, shall be perfectly null and void, and no right, title, claim, or interest shall be conveyed thereby."

Inasmuch as the granting acts under consideration did not convey the title of indemnity school lands and did not require patents to be issued therefor, the Commissioner's certificate in this case was authorized and its effect is governed by this section of the Revised Statutes. But the list under consideration also bears the approval of the Secretary of the Interior. That fact leads me to observe that this statute does not say that certification by the Commissioner shall be the exclusive method of passing title, but only says that his certification shall have that effect, where title is not conveyed or patents required by the grant. It is therefore pertinent to inquire whether there is any law authorizing the transfer of title in such cases by approval of the Secretary. If the grant in this case had authorized the selection of indemnity school lands "subject to approval by the Secretary of the Interior," as in a similar grant to California (act of Mar. 3, 1853, sec. 7; 10 Stat. 247), or "with the approval of the Secretary of the Interior," as in the grant to the Dakotas, Montana, and Washington (act of Feb. 22, 1889, sec. 10; 25 Stat. 679), I should be constrained to hold that the approval of the Secretary passed the title without regard to the Commissioner's certificate and unaffected by section 2449 of the Revised Statutes. (*Mullan v. United States*, 118 U. S. 271, 273, 278; *Johanson v. Washington*, 190 U. S. 179, 184.) But there is nothing of the kind. The original grant to Colorado (sec. 7 of the act of Mar. 3, 1875, 18 Stat. 475) does not in any manner provide for selection of indemnity school lands, and the act of February 28, 1891 (26 Stat. 796) only provides that they "may be selected by said State." This failure of the original grant to provide a method for passing title of indemnity school lands is accentuated by the fact that in other portions of the same

act other grants were made of lands to be selected, and such a method was provided. Section 8 (18 Stat. 475) grants to the State 50 sections for public buildings, "to be selected and located by direction of the legislature thereof, and with the approval of the President." Section 9 grants 50 other sections for a penitentiary, "to be selected and located and with the approval as aforesaid." And section 10 provides for setting apart 72 other sections "for the use and support of a State university, to be selected and approved in the manner as aforesaid." The use in sections 8, 9, and 10 of language appropriate to invest the President with authority to pass the title to lands to be selected for the benefit of certain public institutions suggests that the omission of similar language in section 7 with reference to indemnity school lands was intentional. Congress evidently thought that, in the absence of specific reference in the grant, authority already given to the Land Department would suffice to convey the title. "It is not necessary that with each grant there shall go a direction that its administration shall be under the authority of the Land Department. It falls there unless there is express direction to the contrary." *Bishop of Nesqually v. Gibbon*, 158 U. S. 155, 167.) In the absence of a prescribed method for passing title, approval by the Secretary of a list of indemnity lands granted by Congress would have that effect. "Unless Congress clearly designates some other officer to act in respect to such matters it will be assumed that he is the officer to represent the Government." (*Johanson v. Washington*, 190 U. S. 179, 185.) But in this case Congress had, by the act of August 3, 1854 (10 Stat. 346; R. S. 2449), designated another officer, namely, the Commissioner; it had specifically directed the method by which he should pass the title, that is, by certification of lists; and it had prescribed in plain and emphatic language the effect to be given to such certification. It can not, therefore, be held that Congress intended by omission to authorize the Secretary, by a different method, to accomplish a different result.

Congress has also indicated its understanding to be that the method prescribed by the act of August 3, 1854 (R. S. sec. 2449), was the sole method of passing title in

this kind of a case. The original grant of 1875 to Colorado (18 Stat. 475) was of indemnity lands in lieu of sections 16 and 36 "where such sections have been sold or otherwise disposed of by any act of Congress." The act of April 2, 1884 (23 Stat. 10), provides that the prior act "shall be construed as giving to the State of Colorado the right to select for school purposes other lands in lieu of such sixteenth and thirty-sixth section as may have been or shall be found to be mineral lands," and specifically authorizes the Secretary of the Interior to certify to the non-mineral character of the lands so selected and thereby to pass the title thereof as nonmineral lands. If it had been understood that the Secretary already had authority to transfer title by approval of lists, regardless of section 2449, this specific grant of authority would have been superfluous. And if, understanding the contrary, it had been intended to grant such authority in any case other than that specifically dealt with, such intention would naturally have been expressed.

The act of May 20, 1826 (4 Stat. 179), provided generally for the passage of title to indemnity school lands for losses in fractional townships, by means of selections to be made by the Secretary of the Treasury, who then had supervisory jurisdiction over the Land Department. By the act of March 3, 1849 (9 Stat. 395), the Interior Department was created, and the powers of the Secretary of the Treasury with respect to public lands were transferred to the Secretary of the Interior. The act of February 26, 1859 (11 Stat. 385), extended the grant of indemnity school lands so as to cover cases of school sections lost through preemption before survey, and provided for selections in accordance with the provisions of the act of May 20, 1826. Under the act of 1859 titles to indemnity school selections were subject to be transferred by action of the Secretary of the Interior as successor to the Secretary of the Treasury. (*Johanson v. Washington*, 190 U. S. 179, 185.) In this situation the Revised Statutes were enacted, and the provisions of the prior acts were carried forward into sections 2275 and 2276, but with a notable exception; all

provisions for the method of selection and the passage of title were omitted. By omitting those provisions they were repealed. (R. S. sec. 5596.) Subsequently, by the act of February 28, 1891 (26 Stat. 796), these sections were amended so as to extend indemnity grants to cover the cases of school sections lost by any State or Territory, because they were mineral lands, or within a reservation or had been otherwise disposed of, and provided that such indemnity lands "may be selected by said State or Territory." Nothing was said about the passage of title through any action of the Land Department. The omission from sections 2275 and 2276 of the special provisions for passing title, contained in the prior acts from which those sections were taken, and the subsequent amendment in 1891 without any such provision, can not be understood otherwise than as a declaration that section 2449 of the Revised Statutes, providing for certification of lists by the Commissioner, should be the only method of passing title in this class of cases.

With reference to the effect of the certification, I perceive that it is not a case simply of authority given to the Land Department to convey title of nonmineral public land. If that were all, a departmental conveyance of public land as nonmineral would involve a final determination that all of the land embraced in the conveyance is of that character, so that the title thereof would pass from the United States, and jurisdiction to correct an erroneous determination would pass from the Department and become vested in the courts. But the intention of Congress, expressed in section 2449 of the Revised Statutes, to withhold jurisdiction to determine by certification the character of the land, is both plain and emphatic and such as to leave no room for controversy.

It can not be said that incidental jurisdiction to determine that mineral land is nonmineral has been conferred by a law which declares that the act involving such a determination "shall be perfectly null and void" and that "no right, title, claim, or interest shall be conveyed thereby." To give the act of certification in this case the effect of passing title to mineral land would be to disregard and

defy that provision. "The action of the Land Department can not override the expressed will of Congress, or convey away public lands in disregard or defiance thereof." (*Burfenning v. Chicago, etc., Ry. Co.*, 163 U. S. 321, 323; *Beley v. Naphtaly*, 169 U. S. 353, 356.)

The certification may be said to have the force and effect of a patent, because it is an authorized method of conveying title. But whatever efficacy to convey title is possessed by the certification is derived from section 2449 of the Revised Statutes. By that law it conveyed title to lands embraced in the list "that are of the character contemplated by" the granting acts "and intended to be granted thereby." Those acts excepted from their operation all mineral lands. And the final clause of section 2449 declares that the list, "so far as these lands are concerned, shall be perfectly null and void, and no right, title, claim, or interest shall be conveyed thereby." A certification by the Commissioner to lands not open to selection "would not pass title out of the United States because he has no authority in law to make such a certificate." (*Durand v. Martin*, 120 U. S. 366, 370.) Such action "is not merely irregular but absolutely void, and may be shown to be so in any collateral proceeding." (*Noble v. Union River Logging Railroad*, 147 U. S. 165, 174.) As to such lands, "the certification had no operative effect." (*Weeks v. Bridgman*, 159 U. S. 541, 547.)

The certified list must therefore be taken, by force of the law upon which it is founded, as reserving mineral land. It is thus seen to be precisely analogous to a congressional grant of designated lands in place accompanied by a reservation of land of a specified character. (*Mining Co. v. Consolidated Mining Co.*, 102 U. S. 167, 175; *Garrard v. Silver Peak Mines*, 82 Fed. 578, 588; 94 Fed. 983, 984.) In such a case the reserved land is "excepted out of the grant as much as if in a deed it had been excluded from the conveyance by metes and bounds." (*Kansas Pacific Ry. Co. v. Dunmeyer*, 113 U. S. 629, 644; *Sioux City, etc., Land Co. v. Griffey*, 143 U. S. 32, 40; *Whitney v. Taylor*, 158 U. S. 85, 93; *Weeks v. Bridgman*, 159 U. S. 541, 545.)

The view expressed by Acting Attorney General Phillips in 17 Op. 406, 408, to the effect that a certification under section 2449 of the Revised Statutes divests the Department of jurisdiction over lands required by the grant to be excepted, was not necessary to a disposition of the matter before him. The case then under consideration was, like that involved in *Mullan v. United States*, 118 U. S. 271, 273, 274, the case of an approval by the Secretary of the Interior of a list of selections under section 7 of the California grant of March 3, 1853 (10 Stat. 247), which specifically authorized such selections "subject to approval by the Secretary of the Interior." That provision prescribed the method of passing title and invested the Secretary with incidental jurisdiction to determine the character of all the land embraced in the list, unrestrained by section 2449.

In *Burke v. Southern Pacific R. Co.*, 234 U. S. 669, 705-709, it was held that an exception of mineral land in a patent was ineffectual to reserve such land, because the statute requiring the patent did not authorize the exception. Hence it was held that the patent evidenced a precedent determination by the Land Department that all the lands embraced in the patent were nonmineral in character. In the case now under consideration, the exception of mineral lands from the certified list was required and jurisdiction to determine the character of the lands by certification was withheld.

The statement in *Mullan v. United States*, 118 U. S. 271, 279, and in *Noble v. Union River Logging Railroad*, 147 U. S. 165, 176, quoting from *United States v. Stone*, 2 Wall. 525, 535, that "one officer of the land office is not competent to cancel or annul the act of his predecessor," is without any real significance here. Where the title has passed by the authorized act of a land officer, neither he nor his successor can revoke the act and reassume jurisdiction over the land; but where the act in question does not pass the title, neither he nor his successor has lost any jurisdiction over the land which pertains to the office. (*Beley v. Naphtaly*, 169 U. S. 353, 364.)

The result is that, as to coal land embraced in the certified list under consideration, and known to be such at the time of the selection, the title thereto remains in the United States, subject to the control and disposition of the Land Department.

This disposes of the first and second questions propounded.

The third question is whether the jurisdiction of your Department over the excepted land can be exercised after the lapse of the limitation period prescribed in the act of March 3, 1891. Section 8 of that act provides (26 Stat. 1099):

“That suits by the United States to vacate and annul any patent heretofore issued shall only be brought within five years from the passage of this act, and suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patent.”

The certification in question is an authorized method of conveying title and therefore may be said to have the force and effect of a patent. But it is so authorized and has such force and effect only by virtue of the statute upon which it is founded. Without the statute it is unauthorized and has no force or effect whatever. Read, as the certification must be in order to have any force or effect, in connection with section 2449 of the Revised Statutes, mineral lands which were known to be such at the time of the selection by the State, are excepted from its operation. As to such lands, the certification, under the statute, does not purport to convey any title. Hence, even though the limitation statute should be held to bar a suit by the United States to cancel or annul a certification or to confirm the title which it purports to convey, as to which no opinion is expressed (see *United States v. Chandler-Dunbar Co.*, 209 U. S. 447, 450; *Shaw v. Kellogg*, 170 U. S. 312, 341; *United States v. Winona, etc., R. Co.*, 165 U. S. 463, 476; *Louisiana v. Garfield*, 211 U. S. 70, 77), nevertheless lands excepted from its operation are not thereby affected.

The third question therefore is answered in the affirmative.

The foregoing renders unnecessary an answer to the fourth and last question.

Very respectfully,

T. W. GREGORY.

To the SECRETARY OF THE INTERIOR.

FEDERAL RESERVE BANKS.

The Federal Reserve Board does not possess the power to abolish any of the existing Federal reserve districts or Federal reserve banks.

DEPARTMENT OF JUSTICE,

November 22, 1915.

SIR: I have your letter transmitting a request from the Governor of the Federal Reserve Board for my opinion as to the power of the board to *abolish* any of the existing Federal reserve districts or Federal reserve banks. The Secretary of the Treasury, who is *ex officio* chairman of the board, unites with the governor in making this request: and you ask that I comply with it.

The act creating the Federal reserve system (38 Stat. 251, ch. 6) provided for an "Organization Committee" to be composed of the Secretary of the Treasury, the Secretary of Agriculture, and the Comptroller of the Currency (sec. 2).

The act also established a permanent body known as the "Federal Reserve Board" (sec. 10).

A reading of the act shows at once that the Organization Committee was created not merely for the purpose of attending to the formalities of organization or to serve as a stop-gap until the Federal Reserve Board should come into existence, but that it had an independent function to perform and to that end was invested with wide powers. That is to say, its function was to *organize* the system as contradistinguished from the function of the Federal Re-

serve Board, which was primarily to *administer* the system.

This being the general scheme, the act provided that the Organization Committee,

"as soon as practicable * * * shall designate not less than eight nor more than twelve cities to be known as Federal reserve cities, and shall divide the continental United States, excluding Alaska, into districts, each district to contain only one of such Federal reserve cities (sec. 2)."

It provided further that these districts—

"shall be apportioned with due regard to the convenience and customary course of business and shall not necessarily be coterminous with any State or States,"

and—

"shall be known as Federal reserve districts and may be designated by number (sec. 2)."

In order that it might have the information and advice essential to the discharge of this duty, the Organization Committee was authorized—

"to employ counsel and expert aid, to take testimony, to send for persons and papers, to administer oaths, and to make such investigation as may be deemed necessary by the said committee in determining the reserve districts and in designating the cities within such districts where such Federal reserve banks shall be severally located (sec. 2)."

Upon the establishment of the Federal reserve districts by the Organization Committee a certificate must be filed with the Comptroller of the Currency—

"showing the geographical limits of such districts and the Federal reserve city designated in each of such districts (sec. 4)."

Having thus authorized the Organization Committee to designate Federal reserve cities and to create around each a Federal reserve district, the act directed that—

"The said committee shall supervise the organization in each of the cities designated of a Federal reserve bank * * * (sec. 2)."

The act then prescribes how these banks shall be constituted:

Every National bank is required to subscribe to the capital stock of the Federal reserve bank of its district in a sum equal to 6 per cent of its paid-up capital stock and surplus, one-sixth payable on the call of the Organization Committee or of the Federal Reserve Board, one-sixth within three months, and one-sixth within six months, the remainder subject to call by the Federal Reserve Board when deemed necessary (sec. 2). State banks declared eligible by the Organization Committee, while, of course, not required to subscribe, were authorized to do so (secs. 2, 4).

If the subscriptions by banks to the stock of any Federal reserve bank in the judgment of the Organization Committee do not provide an adequate capital, the Organization Committee may offer the stock of such Federal reserve bank to public subscription; and if the total subscriptions by banks and the public fall short of supplying an adequate capital, the Organization Committee shall allot to the United States such an amount of the stock of the Federal reserve bank in question as the committee shall determine. Stock not held by banks has no voting power (sec. 2).

No Federal reserve bank is permitted to commence business with a subscribed capital of less than \$4,000,000 (sec. 2), nor until authorized so to do by the Comptroller of the Currency (sec. 4).

When the minimum amount of capital stock required for the organization of any Federal reserve bank shall have been subscribed, the Organization Committee is directed to designate any five of the subscribing banks to complete the organization and to execute and file with the Comptroller of the Currency a certificate of organization stating the name of such Federal reserve bank, the city and State in which it is located, the territorial extent of the district in which its operations are to be carried on, the amount of its capital stock and the number of shares into which the same is divided, the name and place of business of each

bank executing the certificate of organization, and of each subscribing bank and the number of shares subscribed by each, etc. (sec. 4).

Upon the filing of this certificate such Federal reserve bank becomes a body corporate with the powers which are enumerated, amongst them the power—

“To have succession for a period of twenty years from its organization unless it is sooner dissolved by an Act of Congress, or unless its franchise becomes forfeited for some violation of law (sec. 4).”

Acting under the authority of these provisions, the Organization Committee divided the country into 12 Federal reserve districts and designated in each a Federal reserve city. Boston was designated as the Federal reserve city for District No. 1; New York for District No. 2; Philadelphia for District No. 3; Cleveland for District No. 4; Richmond for District No. 5; Atlanta for District No. 6; Chicago for District No. 7; St. Louis for District No. 8; Minneapolis for District No. 9; Kansas City for District No. 10; Dallas for District No. 11; San Francisco for District No. 12. A certificate to that effect was filed on April 2, 1914, in the office of the Comptroller of the Currency.

A Federal reserve bank was duly organized at each of these cities. On May 18–20, 1914, all filed their certificates of organization and thereby became bodies corporate with the rights and powers enumerated in section 4 of the act. Their organization was officially announced by the Secretary of the Treasury pursuant to the second paragraph of section 19 of the act, and on November 14, 1914, pursuant to section 4 of the act, they were authorized by the Comptroller of the Currency to commence business.

They have been engaged in business for a little over a year. Their statement for the week ending November 12, 1915, shows their capital, deposits, and total resources as follows:

Federal reserve bank of—	Capital.	Deposits.	Resources.
Boston.....	\$5,171,000	\$22,218,000	\$28,615,000
New York.....	11,059,000	181,710,000	196,544,000
Philadelphia.....	5,273,000	19,933,000	25,206,000
Cleveland.....	5,945,000	18,556,000	24,501,000
Richmond.....	3,352,000	113,160,000	21,889,000
Atlanta.....	2,117,000	111,268,000	16,629,000
Chicago.....	6,635,000	49,993,000	56,628,000
St. Louis.....	2,775,000	11,204,000	13,982,000
Minneapolis.....	2,495,000	10,425,000	12,920,000
Kansas City.....	3,027,000	9,826,000	14,080,000
Dallas.....	2,753,000	111,992,000	13,871,000
San Francisco.....	3,941,000	14,032,000	17,973,000
Total.....	54,846,000	374,317,000	446,192,000

Includes Government deposit of \$5,000,000.

All of them have issued Federal reserve notes of which at the present time \$160,000,000 in round figures are outstanding.

One has purchased a site for its bank building and the others have leased quarters for long terms.

The question is, Has the Federal Reserve Board the power to *abolish* any of the existing Federal reserve districts established by the Organization Committee as hereinabove described?

As there can be only one Federal reserve bank in a district, a district can not be abolished without abolishing a bank. Therefore, inseparably linked with the question first stated is the further question, Has the Federal Reserve Board the power to *abolish* a Federal reserve bank?

And since, concededly, the power to *abolish* a Federal reserve district or a Federal reserve bank is not granted in express terms, the question finally becomes, Is it to be implied from other provisions of the act that Congress intended to confer that power?

The counsel of the board held not, in an opinion dated March 1, 1915. Subsequently, Mr. Joseph P. Cotton, of New York, was consulted and he reached the opposite conclusion in an opinion dated November 19, 1915.

The Federal reserve banks are not banks in the ordinary sense. They are banks composed of banks. They touch the business life of the Nation in its most sensitive spot. Of all the processes of business, theirs is perhaps the most delicate.

In determining whether Congress intended by implication to confer upon the Federal Reserve Board power to abolish one or more of these institutions, it is proper to consider that if the power exists at all it may be exercised not only now but at any time in the future. Certainly it was the expectation of Congress that the Federal reserve banks would extend their roots deep; that upon them as a foundation permanent banking arrangements better than any we have ever known would be constructed; and that they would become interwoven with the business fabric of the country.

If these expectations shall be realized, and in this discussion we must assume that they will be, the abolition of one or more of the Federal reserve districts, and consequently of one or more of the Federal reserve banks, whether for better or for worse, would profoundly affect the currents of trade and alter the whole face of business throughout vast sections of the country, to say nothing of the effect upon the investments of member banks and perhaps of the public in the capital stocks of reserve banks.

It must be acknowledged that the power to do such a thing is, to borrow a phrase of the Supreme Court, "a power of supreme delicacy and importance"; and I am of the opinion that the failure to confer such a power in express terms would be regarded by the courts as virtually conclusive that Congress did not intend it to be exercised except by itself.

A leading case in point is *Interstate Commerce Commission v. Railway Co.* (167 U. S. 479). There the question was whether the Interstate Commerce Commission, when it found a particular rate to be unreasonable, was given the power by the act to regulate commerce as originally enacted to prescribe what should be a reasonable rate for the future. As in the present instance, the power in question was not expressly given, but the commission claimed that it had the power by necessary implication.

Briefly stated, its contention was that it was expressly charged with the enforcement and execution of the provisions of the act; that amongst other provisions was section 1, which required all charges to be reasonable and

just and prohibited every unjust and unreasonable charge; that in the nature of things it could not enforce this mandate of the law without a determination of what are reasonable and just charges; and finally, since no other tribunal was created to make that determination, it must be implied that the commission was authorized to do so. (167 U. S. 500, 501.)

The court, overruling this contention, held that as the act did not expressly grant the power, the commission did not possess it. Speaking through Mr. Justice Brewer, the court said:

"The question debated is whether it (Congress) vested in the commission the power and the duty to fix rates; and the fact that this is a debatable question, and has been most strenuously and earnestly debated, is very persuasive that it did not. The grant of such a power is never to be implied." (494.)

Again, it refers to—

"the inference which irresistibly follows from the omission to grant in express terms to the commission this power of fixing rates." (506.)

And again—

"The vice of this argument is that it is building up indirectly and by implication a power which is not in terms granted." (509.)

Still again—

"And if it (Congress) had intended to grant the power to establish rates, it would have said so in unmistakable terms." (509.)

Whilst this seems to me decisive of the matter. I will nevertheless examine the provision of the act which is put forward as a ground for implying that Congress intended to confer upon the Federal Reserve Board the power in question. That provision, which is found in section 2 immediately following the grant of power to the Organization Committee to designate Federal reserve cities and to establish Federal reserve districts, reads as follows:

"The determination of said organization committee shall not be subject to review except by the Federal Reserve Board when organized: *Provided*, That the districts shall

be apportioned with due regard to the convenience and customary course of business and shall not necessarily be coterminous with any State or States. The districts thus created may be readjusted and new districts may from time to time be created by the Federal Reserve Board, not to exceed twelve in all."

The merely negative statement that the determination of the Organization Committee "*shall not* be subject to review except by the Federal Reserve Board when organized" clearly can not be enlarged into an affirmative grant of power to the board to review and set aside everything done by the Organization Committee. The reasonable view is that by that language Congress meant that the determination of the Organization Committee should not be subject to review at all, except in so far as the subsequent provisions specifically authorize a review by the Federal Reserve Board. The only subsequent provision authorizing a review of the determination of the Organization Committee of the Federal Reserve Board is contained in the sentence—

"The districts thus created may be readjusted and new districts may from time to time be created by the Federal Reserve Board, not to exceed twelve in all."

But the power to *readjust* districts does not necessarily carry with it the power to *abolish* districts and banks. On the contrary, it would be departing from the usual meaning of the language to give it that effect. In the affairs of business especially, the word "*readjust*" is associated with the idea of preservation rather than of destruction. When it is used in connection with any business or political entity, we instinctively think, not of the destruction of that entity, but of its preservation in some other form. When it is used in connection with a geographical area, such as a district, we instinctively think of changes in boundary lines—not of the blotting out of anything. To illustrate, suppose the Constitution had provided that Congress should have power to *readjust* the States taken into the Union. Would it be contended that this included the power to abolish States? I can not think so. Likewise

here, in my opinion, the power to readjust districts refers to changes in boundary lines.

This conception of the power is exemplified in the changes heretofore made by the Federal Reserve Board in the boundaries of the districts as fixed by the Organization Committee. To cite one instance, northern New Jersey was detached from the district of which Philadelphia is the center and annexed to the district of which New York is the center.

But if what was meant by a readjustment of districts were obscure instead of reasonably clear, there would still be no ground for implying the power to abolish districts and consequently to abolish banks from a power to readjust districts and to add new districts.

A power not expressly conferred can arise as an incident to the exercise of some other power only because essential to the exercise of that power or because included therein as a *lesser* power of like nature or effect. (*The Floyd Acceptances*, 7 Wall. 666, 680; *Branch v. Jessup*, 106 U. S. 468, 478.)

No one would say that the power to *abolish* is a lesser power than the power to *readjust*. It only remains then to inquire whether the power to *abolish districts and banks* is essential to the exercise of the power to *readjust districts*. In other words, would the power to *readjust districts*, which is expressly conferred upon the board, be nullified or rendered impotent if the power to *abolish districts and banks* is withheld?

I have not heard that contention made and do not see how it could be made. Obviously, the power conferred can fall short of the power of abolition and still have a wide and useful field of operation. From time to time much may be done to promote the convenience and efficiency of the system by readjusting the boundaries of districts, adding here and taking away there, without abolishing districts and without abolishing banks.

The only grounds upon which a power may be implied are thus lacking here. Rather, the specification of the power to readjust districts and of the power to increase the number of districts carries with it the implication that

Congress did not intend to grant the greater power to abolish districts. As the Supreme Court has said in similar circumstances:

"* * * if Congress had desired to grant such authority, it would have been easy to have said so in express terms." (*Tillson v. United States*, 100 U. S. 43, 46.)

Again, it does not seem reasonable to suppose that Congress would have authorized the Organization Committee to establish these very elaborate banking units if another body to be organized only a few months later was to have the power not only to make readjustments among them but to abolish altogether a substantial number of them.

Finally, the power of readjusting districts and of creating new districts conferred by this provision upon the Federal Reserve Board is subject to two limitations only—(1) there must be "due regard to the convenience and customary course of business," and (2) the number of districts can not exceed 12 (sec. 2). If, therefore, the power to readjust districts includes the power to abolish districts, I see nothing to prevent the board from abolishing districts and banks until the number is reduced not only to eight but to six, four, or even one, if in the judgment of the board "due regard to the convenience and customary course of business" dictates that policy. Assuredly, Congress intended no such result.

But not only does *this* provision afford no sufficient basis for implying that Congress intended to grant the power in question: there is *another* provision in the act which shows affirmatively, I think, that it *did not* intend to grant that power.

Section 4 provides that—

"Upon the filing of such certificate with the Comptroller of the Currency as aforesaid, the said Federal reserve bank shall become a body corporate and as such, and in the name designated in such organization certificate, shall have power—

* * * * *

"Second. *To have succession for a period of twenty years from its organization unless it is sooner dissolved by*

an Act of Congress, or unless its franchise becomes forfeited by some violation of law."

Here is an assurance by Congress that a Federal reserve bank organized under the provisions of this act shall have the right to exist for a period of 20 years, except in two specific contingencies, i. e., unless it shall forfeit the right by a violation of law, or unless Congress itself shall shorten the period.

The Federal reserve banks were organized, their capital subscribed, and large obligations undertaken by them on the faith of that express assurance and in the expectation of enjoying that right.

Manifestly, to imply a power in the Federal Reserve Board to abolish Federal reserve banks at will would directly conflict with the rights and powers expressly conferred upon those banks by this section.

A power thus *expressly* conferred can not be destroyed or seriously impaired by *implying* a conflicting power—at least not unless the grounds for the implication are irresistible, which, as we have seen, is not the case here. (*Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 440, 441, 446; *Wilder Mfg. Co. v. Corn Products Co.*, 236 U. S. 165, 174, 175.)

Finally, it remains to be observed that the reports of the committees which considered this act and the debates attending its passage, while discussing fully many different powers conferred or proposed to be conferred upon the Federal Reserve Board, contain no mention of the power here in question. This is very significant. It shows, I think, an entire absence on the part of Congress of any thought of conferring such a power. For, considering the far-reaching consequence of the power, it is not easy to believe that if the granting of it had been under consideration at all, the fact would not have been mentioned by some one in the course of the thorough and exhaustive discussion which the subject underwent in Congress.

I sum up my conclusions as follows:

First, concededly the power to abolish Federal reserve districts and Federal reserve banks is not conferred upon

the Federal Reserve Board in express terms; *second*, it is a rule of statutory construction that the failure to grant in express terms a power of such great consequence raises a convincing presumption that Congress did not intend to grant it; *third*, putting out of view that presumption, there is no provision in the act from which an intention to confer this power can fairly be implied, but, on the contrary, there is a provision which shows affirmatively that Congress did not intend to confer it; *fourth*, the absence of any mention of such a power in the reports of committees and the debates dealing with the legislation shows that the thought of conferring it was not in the mind of Congress. I am of the opinion, therefore, that the board does not possess the power in question.

Very respectfully,

T. W. GREGORY.

To the PRESIDENT.

PANAMA RAILROAD RATES.

The executive officers of the Government have no authority under existing law to fix rates over the Panama Railroad below the cost of service for the purpose of reimbursing the losses of private shippers resulting from the closing of the Panama Canal.

DEPARTMENT OF JUSTICE,
November 24, 1915.

SIR: I have the honor to reply to your letter of November 9, 1915, inclosing a letter from the Secretary of War respecting the rates to be charged upon the Panama Railroad during the present obstruction of transportation through the Panama Canal.

As I understand the matter, the Secretary wishes to know whether, by fixing rates over the railroad at lower than the cost of service, the Government may in effect reimburse shippers via the canal for losses resulting from the obstruction of transportation through the canal and for which the Government is not legally responsible. The

Secretary states the legal questions involved in the problem as follows:

"1. Has the United States Government the power, under existing law, to diminish the appropriations for the Panama Canal by suffering a loss on the transportation of freight across the Isthmus on the Panama Railroad?"

"2. Has the United States Government the power, under existing law, to diminish the funds of the Panama Railroad by suffering a loss on the transportation of freight across the Isthmus on the Panama Railroad?"

By the "United States Government" I assume, of course, that in this connection he means the executive officers of the Government.

As to the first question, the law is clear that appropriations made for one purpose may not be diverted to another purpose:

Constitution, Article I, section 9, clause 7—

"No money shall be drawn from the Treasury but in consequence of appropriations made by law."

Revised Statutes, section 3678—

"All sums appropriated to the various branches of expenditure in the public service shall be applied solely to the objects for which they are respectively made, and for no others."

Neither is there any authority of law, in my opinion, to use for such a purpose the funds of the railroad company, and this irrespective of whether we observe or disregard the corporate fiction.

If we observe the fiction and treat the railroad company as a wholly independent corporation—which has been the course pursued in past dealings with it (25 Op. 466; Mss. Op. of Attorney General McReynolds, Aug. 11, 1914)—the question turns upon the power of the directors. No Federal statute exists by which their power is defined. It must be determined, therefore, by reference to the ordinary principles of corporation law.

It is a fundamental principle of corporation law that the assets of a corporation may not be given away by the directors except with the unanimous consent of the stock-

holders. (*Morawetz on Corporations*, secs. 423, 424; *Cook on Corporations*, sec. 681.) Deliberately carrying below cost is *pro tanto* a giving away of the working capital of the railroad company, and if extensively pursued might seriously impair its capacity to perform the public duties for which it was created. (See *Commonwealth v. Fitchburg R. Co.*, 12 Gray (Mass.) 180, 189-190.) Nor does this case fall within the exceptional class in which such donations have been permitted for the sake of ultimate benefit to the donor corporation, for here the ultimate benefit, if any, will accrue to the canal, and not to the railroad company. Of course, the United States, as sole stockholder, might consent to such a donation, but only Congress would have authority to speak for the United States in that regard.

On the other hand, if, in view of the ownership of practically all of the stock of the railroad company by the United States, we abandon the fiction that the railroad company is a separate entity and accordingly treat it as owned and operated in common with the canal directly by the United States, the result is the same. For on that theory, giving money from the treasury of the railroad company would really be giving money from the Treasury of the United States, which is not permissible, of course, except in consequence of specific appropriation by Congress.

In my opinion, therefore, the executive officers of the Government have no authority under existing law to fix rates over the Panama Railroad below the cost of service for the purpose of reimbursing the losses of private shippers resulting from the closing of the Panama Canal.

Respectfully,

T. W. GREGORY.

To the PRESIDENT.

FEDERAL RESERVE BANKS—STAMP TAX ON STOCK
CERTIFICATES.

Certificates of stock to be issued to member banks by Federal reserve banks should not be revenue stamped under Schedule A of the act of October 22, 1914 (38 Stat. 759).

DEPARTMENT OF JUSTICE,

March 10, 1916.

SIR: I have the honor to acknowledge receipt of your letter of February 15, 1916, wherein you ask my opinion as to whether certificates of stock to be issued to member banks by Federal reserve banks must be revenue stamped. In my opinion they should not be so stamped, and for these reasons:

The Federal reserve act of December 23, 1913 (38 Stat. 258), provides that—

“Federal reserve banks, including *the capital stock* and surplus therein, and the income derived therefrom shall be exempt from Federal, State and local taxation, except taxes upon real estate.”

This act plainly frees such stock certificates of the stamp duty tax unless its force has been modified by subsequent legislation. Whether this is so or not depends on the interpretation of certain language in Schedule A of the act of October 22, 1914 (38 Stat. 759), providing for a stamp tax on—

“each original issue whether on organization or reorganization, of certificates of stock by any such association
* * * etc.”

In my opinion the exemption created by the first-named act is in no wise affected by the last-quoted provision. The latter act can, and properly should be, read as imposing a tax on certificates of stock other than the capital stock of a Federal reserve bank. The rule controlling the case is announced by the Supreme Court of the United States in *Washington v. Miller* (235 U. S. 422, 428), as follows:

“In these circumstances we think there was no implied repeal, and for these reasons: First, such repeals are not favored, and usually occur only where there is such an

irreconcilable conflict between an earlier and a later statute that effect cannot reasonably be given to both (citing cases); second, where there are two statutes upon the same subject, the earlier being special and the later general, the presumption is, in the absence of an express repeal, or an absolute incompatibility, that the special is intended to remain in force as an exception to the general (citing cases); and, third, there was in this instance no irreconcilable conflict or absolute incompatibility, for both statutes could be given reasonable operation if the presumption just named were recognized."

See also *Townsend v. Little*, 109 U. S. 504, 512; *Ex parte Crow Dog*, 109 U. S. 556, 570; *Rodgers v. United States*, 185 U. S. 83, 87, 89; *United States v. Healey*, 160 U. S. 136, 146; *United States v. Greathouse*, 166 U. S. 601, 605; *People v. Hanrahan*, 42 N. W. 1124; *State ex rel. v. Stratton*, 38 S. W. 83; *Wheeler v. Lane*, 15 Vt. 26.

Respectfully,

T. W. GREGORY.

To the SECRETARY OF THE TREASURY.

CIVIL SERVICE RULES PROHIBITING POLITICAL DISCRIMINATION.

The Civil Service Commission has authority, under clause 4, section 2, of the civil service act of January 16, 1883 (22 Stat. 404), to investigate alleged violations of civil service rules prohibiting political discrimination in the classified service.

DEPARTMENT OF JUSTICE,

March 24, 1916.

SIR: You have recently referred to me for an opinion a letter from the Civil Service Commission dated February 11, 1916, together with a memorandum upon the authority of the Civil Service Commission to investigate alleged violations of the civil service rules prohibiting political discrimination in the classified service, and copies of correspondence between the Civil Service Commission and the Secretary of the Treasury, a copy of an opinion rendered by the Solicitor of the Treasury, and a copy of

one of certain affidavits submitted to the Civil Service Commission. These papers show the following facts:

On November 27, 1915, Hon. Nicholas Longworth, a Member of Congress from Ohio, filed with the Civil Service Commission affidavits charging Hon. A. C. Gilligan, collector of internal revenue for the second district of Ohio, with exercising political discrimination in appointments, assignments, punishments, and removal of employees in the competitive classified service. On January 3, 1916, the commission wrote to the Secretary of the Treasury advising him that the above communication had been received from Mr. Longworth, and that affidavits had been filed in support of the charges made and requesting that a representative of the Treasury Department cooperate with the commission in making an investigation of the charges. On January 11, 1916, the Solicitor of the Treasury submitted an opinion to the Secretary of the Treasury to the effect that the Civil Service Commission had no power to make such investigation. On January 14, 1916, the Secretary of the Treasury wrote to the Civil Service Commission, declining to designate a representative to cooperate with it, basing such refusal upon the opinion of the solicitor.

At the outset I may point out that a number of the questions discussed in the opinion of the Solicitor of the Treasury are in no way presented for my determination. Thus the probative value of the affidavits submitted is not involved; nor is any question presented as to the power of the collector of internal revenue to remove subordinates; nor the question whether a court of equity may enjoin the removal of Federal employees in violation of civil service rules, which was the point determined in the cases of *Woods v. Gary*, 25 Wash. Law Rep. 591; and *United States ex rel Taylor v. Taft*, 24 App. D. C. 95, relied upon by the solicitor.

The only question presented and upon which I shall express an opinion, is whether the Civil Service Commission may lawfully investigate alleged violations of the civil service rules hereafter set forth.

Section 2 of the civil service law (act of January 16, 1883, chapter 27—22 Stat. 403) provides:

"It shall be the duty of said commissioners:

"First. To aid the President, as he may request, in preparing suitable rules for carrying this act into effect, and when said rules shall have been promulgated it shall be the duty of all officers of the United States in the departments and offices to which any such rules may relate to aid, in all proper ways, in carrying said rules, and any modifications thereof, into effect.

"Second. And, among other things, said rules shall provide and declare, as nearly as the conditions of good administration will warrant, as follows:

* * * * *

"Fifth. That no person in the public service is for that reason under any obligations to contribute to any political fund, or to render any political service, and that he will not be removed or otherwise prejudiced for refusing to do so.

"Sixth. That no person in said service has any right to use his official authority or influence to coerce the political action of any person or body."

The fourth clause of section 2 of the said act provides:

"Said commission may make investigations concerning the facts, and may report upon all matters touching the enforcement and effects of said rules and regulations, and concerning the action of any examiner or board of examiners hereinafter provided for, and its own subordinates, and those in the public service, in respect to the execution of this act."

Section 7 of said act provides that "nothing herein contained shall be construed * * * to take from the President any authority not inconsistent with this act conferred by the seventeen hundred and fifty-third section of" the Revised Statutes.

Section 1753 of the Revised Statutes reads as follows:

"The President is authorized to prescribe such regulations for the admission of persons into the civil service of the United States as may best promote the efficiency

thereof, and ascertain the fitness of each candidate in respect to age, health, character, knowledge, and ability for the branch of service into which he seeks to enter; and for this purpose he may employ suitable persons to conduct such inquiries, and may prescribe their duties, and establish regulations for the conduct of persons who may receive appointments in the civil service."

The civil service rules as stated in the promulgating clause, are promulgated by the President "in the exercise of power conferred by the Constitution, by section 1753, Revised Statutes, and by the civil service act of January 16, 1883." Among the rules so promulgated are the following:

"Rule I, section 2. No discrimination shall be exercised, threatened, or promised by any person in the executive civil service against or in favor of an applicant, eligible, or employee in the classified service because of his political or religious opinions or affiliations.

"Rule XII, section 2. In making removals or reductions, and in other punishment, like penalties shall be imposed for like offenses, and no discrimination shall be exercised for political or religious reasons."

The Solicitor of the Treasury argues that the rules which I have quoted are invalid, and that being invalid the Civil Service Commission can not under the fourth clause of section 2 of the civil service law, make an investigation "touching the enforcement and effects of said rules." His argument is, briefly, that as the civil service law in declaring what the civil service rules shall provide, refers only to contributions to political funds, or rendering political service, and coercion of political action, the President has no power to prohibit political discrimination of any kind not mentioned in the statute, and hence that the rules above quoted are invalid.

I am unable to assent to this view.

Section 2 of the civil service law merely directs what the rules to be promulgated by the president shall contain. They are not mandatory or absolute, for the statutory directions are only to be followed "as nearly as the conditions of good administration will warrant." A large dis-

cretion is, therefore, left to the President to modify the statutory directions if in his judgment such action should be required for the purposes of good administration. Nor are the statutory rules exclusive, for it is provided that "*among other things*" the rules shall provide as set forth in the statute. (See *Johnson v. United States* (1905), 26 App. D. C., 128.) Thus the President is given wide power to supplement the statutory rules by others not specifically covered by the statute.

As was said by Attorney General Knox (23 Op. 595, 597, Dec. 2, 1901):

"Short of a purpose to break down this law, or impose some arbitrary and unfair requirement which is inconsistent with the spirit of law in general (a supposition too absurd to be indulged), it is not too much to say that the determination of the contents of these rules rests almost wholly with the President himself."

The rules quoted above, which are objected to by the Solicitor of the Treasury, are, in my opinion, clearly authorized by the civil service law. The chief purpose of that law was to take positions in the classified service out of politics, and rules forbidding political discrimination in the appointment or removal of employees in such service are clearly in furtherance of that object, and in fact almost essential to the proper enforcement of the law.

In view of the above, it is unnecessary for me to consider whether the power to regulate or forbid improper political action by his subordinates, as well as the power to require investigation of subordinates exists in the President, independently of the civil service law, in so far as it is not positively restricted by statute. There are several decisions which seem to uphold the existence of such power: *Carr v. Gordon* (1897), 82 Fed. 373; *Taylor v. Kercheval* (1897), 82 Fed. 497; *Morgan v. Nunn* (1898), 84 Fed. 551; *Page v. Moffett* (1898), 85 Fed. 38.

The rules in question being, in my opinion, a valid exercise of power by the President under the civil service law, it is clear that the Civil Service Commission has authority under the fourth clause of section 2 of the civil service law

to investigate any matter "touching the enforcement and effects of said rules," and consequently to investigate the facts concerning the alleged violations of the rules by the official in question.

Respectfully,

T. W. GREGORY.

To the PRESIDENT.

CHANGE OF LOCATION OF FEDERAL RESERVE BANKS.

The Federal Reserve Board can not legally change the present location of any Federal reserve bank, whether there has been an alteration or readjustment in the district lines or not.

The Federal reserve act, in prescribing a minimum capitalization of \$4,000,000 for Federal reserve banks as a condition precedent to commencing business, does not require that such minimum capitalization shall be preserved when member banks reduce their capital stock or surplus, or cease to be members.

DEPARTMENT OF JUSTICE,

April 14, 1916.

SIR: At the request of the Federal Reserve Board you have submitted the following questions for my opinion:

"I. Can the Federal Reserve Board legally change the present location of any Federal reserve bank:

"(a) In the case where there has been no alteration in the district lines, and

"(b) In the case where there has been such readjustment of district lines as in the opinion of the board necessitates the designation of a new Federal reserve city in order that due regard may be given to the convenience and customary course of business as required by section 2 of the Federal reserve act?

"II. Must the Federal Reserve Board, in exercising it admitted power to readjust, preserve the \$4,000,000 minimum capitalization required of each Federal reserve bank as a condition precedent to the commencement of business?"

I.

In my opinion of November 22, 1915, I expressed the view that the Federal reserve act does not confer on the Federal Reserve Board the power to *abolish* any of the

existing Federal reserve banks or Federal reserve districts. I believe that the reasoning of that opinion is equally applicable to both branches of the first question now submitted.

Section 2 of the Federal reserve act provides (38 Stat. 251):

"As soon as practicable, * * * the Reserve Bank Organization Committee shall designate not less than eight nor more than twelve cities to be known as Federal reserve cities, and shall divide the continental United States * * * into districts, each district to contain only one of such Federal reserve cities. The determination of said organization committee shall not be subject to review except by the Federal Reserve Board when organized: *Provided*, That the districts shall be apportioned with due regard to the convenience and customary course of business and shall not necessarily be coterminous with any State or States. The districts thus created may be re-adjusted and new districts may from time to time be created by the Federal Reserve Board, not to exceed twelve in all. Such districts shall be known as Federal reserve districts and may be designated by number. * * *

"Said organization committee shall be authorized * * * to make such investigation as may be deemed necessary by the said committee in determining the reserve districts and in designating the cities within such districts where such Federal reserve banks shall be severally located."

The same section further provides:

"The said committee shall supervise the organization in each of the cities designated of a Federal reserve bank, which shall include in its title the name of the city in which it is situated, as 'Federal Reserve Bank of Chicago.'"

Since the act thus provides that each city designated as a Federal reserve city is to be the location of a Federal reserve bank, it follows that a change in the location of a Federal reserve bank would in effect be the designation of a new Federal reserve city and the abandonment of one

previously designated. I find no more warrant in the act for the abandonment of one Federal reserve city and the designation of a new one than I do for the abolition of a Federal reserve district when once established.

The power to designate a new Federal reserve city (12 cities having been named by the organization committee), or to change the location of a Federal reserve bank, is not expressly conferred by the act on the Federal Reserve Board. If the board possesses such power it is only by implication from the provision (sec. 2) that—

“The determination of said organization committee shall not be subject to review except by the Federal Reserve Board when organized: *Provided*, That the districts shall be apportioned with due regard to the convenience and customary course of business and shall not necessarily be coterminous with any State or States. The districts thus created may be readjusted and new districts may from time to time be created by the Federal Reserve Board, not to exceed twelve in all.”

In my opinion there is no clear indication either in the provision just quoted or elsewhere in the act of an intent to confer on the Federal Reserve Board the power to change the location of Federal reserve banks by the designation of new Federal reserve cities. On the contrary, there are indications of an opposite intent. As stated in my opinion of November 22, 1915, above referred to—

“The merely negative statement that the determination of the organization committee ‘*shall not*’ be subject to review except by the Federal Reserve Board when organized’ clearly cannot be enlarged into an affirmative grant of power to the board to review and set aside everything done by the organization committee. The reasonable view is that by that language Congress meant that the determination of the organization committee should not be subject to review at all, except in so far as the subsequent provisions specifically authorize a review by the Federal Reserve Board. The only subsequent provision authorizing a review of the determination of the organization committee by the Federal Reserve Board is contained in the sentence—

“‘The districts thus created may be readjusted and new districts may from time to time be created by the Federal Reserve Board, not to exceed twelve in all.’”

Again, as stated in that opinion—

“A reading of the act shows at once that the organization committee was created not merely for the purpose of attending to the formalities of organization or to serve as a stop-gap until the Federal Reserve Board should come into existence, but that it had an independent function to perform and to that end was invested with wide powers. That is to say, its function was to *organize* the system as contradistinguished from the function of the Federal Reserve Board, which was primarily to *administer* the system.”

The duty of designating Federal reserve cities belonged to the Reserve bank organization committee as a part of the organization of the system, and the committee was required by the act to designate not less than 8 nor more than 12 cities. This duty is named first among those imposed upon the organization committee, and it is imposed by the same provision of section 2 which required the committee to divide the United States into Federal reserve districts. The same considerations that indicate an intention that the several districts should be permanent would also indicate that the designation of the cities was not to be made for temporary purposes, but was intended to be permanent, subject, of course, to change by Congress. The designation was to be made only after thorough investigation, and the same machinery was provided to facilitate both the determination of the districts and the designation of the cities. Thus, section 2 provides:

“Said organization committee shall be authorized to employ counsel and expert aid, to take testimony, * * * and to make such investigation as may be deemed necessary * * * in determining the reserve districts *and in designating the cities* within such districts where such Federal reserve banks shall be severally located.”

In my opinion, this coupling of the duty of determining the districts with the duty of designating the Federal

reserve cities within the several districts shows an intention on the part of Congress that the cities so designated are to constitute the fixed centers in the scheme or system of division, the duty of designating the cities being coordinate with the duty of forming districts around them. It was left to the discretion of the organization committee whether it should designate the full number of Federal reserve cities and establish the full number of Federal reserve districts permitted by the act. The committee elected to designate and establish the full number authorized, thereby practically suspending the operation of the provision of the act that "new districts may from time to time be created by the Federal Reserve Board, not to exceed twelve in all." The primary, if not the only purpose of that provision, must have been to take care of the situation in the event that the organization committee had designated less than 12 Federal reserve cities.

The fact that the Federal Reserve Board, aside from the provision relating to the creation of new districts from time to time, was merely given the power to "readjust" districts suggests that there was to be some permanent characteristic or element in the districts created by the organization committee. If, however, in addition to the power which the Federal Reserve Board has of readjusting districts by changing their boundary lines, it also possessed the power to change the location of the respective Federal reserve cities within such districts, then the board could, by successive changes of cities and boundaries, entirely obliterate existing districts and substitute in their place new districts totally different from those created by the organization committee. I do not think that Congress intended to confer such a power.

The act provides that each Federal reserve bank is to include the name of the city in which the bank is located. By section 4 it is provided that the organization certificate of each bank shall state specifically—

"The name of such Federal reserve bank, the territorial extent of the district over which the operations of such Federal reserve bank are to be carried on, *the city and State in which said bank is to be located*, the amount of

capital stock and the number of shares into which the same is divided * * *."

Upon the filing of such certificate with the Comptroller of the Currency in the manner prescribed, such Federal reserve bank—

"shall become a body corporate and as such, *and in the name designated in such organization certificate*, shall have power—

"* * * To have succession for a period of twenty years from its organization unless it is sooner dissolved by an act of Congress, or unless its franchise becomes forfeited by some violation of law." (Sec. 4.)

It is to be noted that there is no provision in the act by which the Federal Reserve Board may change the name of a Federal reserve bank or amend its certificate in this respect. The whole tenor suggests permanency.

The omission of Congress to grant, by express language, the power to change Federal reserve cities is significant, especially in view of the language of section 11 (e) of the act, which confers the power—

"To add to the number of cities classified as reserve and central reserve cities * * *; or to reclassify existing reserve and central reserve cities, or to terminate their designation as such."

It would have been equally easy, had Congress desired to grant the authority to designate new Federal reserve cities, to have said so in express terms. (*Tillson v. United States*, 100 U. S., 43, 46, quoted in my opinion of November 22, 1915, *supra*.)

It may be suggested that changes in the "customary course of business" or other changes not foreseen by the organization committee may result in inconveniences which the Federal Reserve Board can not remedy if its power to change the location of Federal reserve cities is denied. The answer is that the remedy is with Congress, in so far as it may not already be supplied by section 3, which authorizes the establishment of as many branch banks in any district as may be found expedient.

To sum up my conclusion on the question whether the Federal Reserve Board can legally change the present

location of any Federal reserve bank, I am of opinion that the board has no such power, and that such power is lacking whether there has been an alteration or readjustment in the district lines or not.

II.

Coming now to the consideration of the second question submitted, namely, whether the Federal Reserve Board, in exercising its admitted power to readjust, must preserve the \$4,000,000 minimum capitalization required of each Federal reserve bank as a condition precedent to the commencement of business, I am of opinion that this question is to be answered in the negative.

The Federal reserve act provides, in section 2:

"No Federal reserve bank shall *commence business* with a *subscribed capital* less than \$4,000,000."

The same section also contains a provision requiring subscriptions to the capital stock to be paid—

"One-sixth * * * on call of the organization committee or of the Federal Reserve Board, one-sixth within three months and one-sixth within six months thereafter, and the remainder of the subscription, or any part thereof, shall be *subject to call when deemed necessary by the Federal Reserve Board* * * *."

Section 4 contains the following provision:

"*When the minimum amount of capital stock prescribed by this act for the organization of any Federal reserve bank shall have been subscribed and allotted*, the organization committee shall designate any five banks * * * to execute a certificate of organization * * *."

"Upon the filing of such certificate with the Comptroller of the Currency the said Federal reserve bank shall become a body corporate."

The decrease of capital stock is authorized by the following provision of section 5:

"The outstanding capital stock shall be increased from time to time as member banks increase their capital stock and surplus or as additional banks become members, *and may be decreased as member banks reduce their capital stock or surplus or cease to be members.*"

Additional provisions relating to the decrease of capital stock are found in sections 5 and 6, as follows:

"Sec. 5. * * * When a member bank reduces its capital stock it shall surrender a proportionate amount of its holdings in the capital of said Federal reserve bank, *and when a member bank voluntarily liquidates it shall surrender all of its holdings of the capital stock* of said Federal reserve bank and be released from its stock subscription not previously called. In either case *the shares surrendered shall be canceled* and the member bank shall receive in payment therefor * * * a sum equal to its cash-paid subscriptions on the shares surrendered * * * less any liability of such member bank to the Federal reserve bank.

"Sec. 6. *If any member bank shall be declared insolvent* * * * *the stock held by it in said Federal reserve bank shall be canceled* * * * and all cash-paid subscriptions on said stock, with one-half of one per centum per month from the period of last dividend, not to exceed the book value thereof, shall be first applied to all debts of the insolvent member bank to the Federal reserve bank, and the balance, if any, shall be paid to the receiver of the insolvent bank. *Whenever the capital stock of a Federal reserve bank is reduced, either on account of a reduction in capital stock of any member bank or of the liquidation or insolvency of such bank, the board of directors shall cause to be executed a certificate to the Comptroller of the Currency showing such reduction of capital stock and the amount repaid to such bank.*"

In section 9 it is provided:

"If at any time * * * a member bank has *failed to comply with* * * * *the regulations of the Federal Reserve Board*, it shall be within the power of the said board, after hearing, to require such bank to *surrender its stock* in the Federal reserve bank; * * * and said Federal reserve bank shall, upon notice from the Federal Reserve Board, be *required to suspend said bank from further privileges of membership*, and shall within thirty days of such notice *cancel and retire its stock* and make payment therefor in the manner herein provided."

It will be observed from the foregoing quotations that the Federal reserve act expressly provides that no Federal reserve bank shall *commence business* with a subscribed capital of less than \$4,000,000. (Sec. 2.) They were each to be organized when the minimum amount of capital stock had been subscribed. (Sec. 4.) Only three-sixths of the capital subscribed is required to be paid in, the remainder being left "subject to call when deemed necessary by the Federal Reserve Board." (Sec. 2.)

The act specifically provides for the decrease of capital stock (1) as member banks reduce their capital stock; and (2) as they cease to be members. (Sec. 5.)

Member banks may cease to be members for any of four causes—

- (a) Voluntary liquidation (sec. 5);
- (b) Insolvency (sec. 6);
- (c) Violation of regulations of Federal Reserve Board (sec. 9);
- (d) Transfer from one Federal district to another through readjustment of districts (sec. 2).

The act specifically requires the cancellation of capital stock where membership ceases under (a), (b), or (c). (Secs. 5, 6, and 9.)

No specific provision is made for cancellation of capital stock where membership ceases under (d).

While the minimum capital had to be *subscribed* in order to *commence* business, the *maintenance* of that minimum is nowhere prescribed by the act. The fact that the board is to determine whether more than half the subscription is to be paid in seems to indicate that the minimum to be subscribed was fixed as a precaution to make sure that ample credit should be pledged to insure the success of the system.

Not only is the maintenance of the minimum not prescribed, but express provision is made for reducing the capital stock as, or whenever, member banks "cease to be members." This language is general and includes in its terms all cases in which member banks cease to be members. It is coupled with no expressed condition that the minimum capitalization be preserved, and since the

Federal reserve act required the organization of the Federal reserve banks upon the subscription of the minimum, it is obvious that any reduction whatever made after commencing business might reduce the capital below the minimum.

It is plain that a member bank can be a member only of the Federal reserve bank of the district in which both are located. This is obvious from the nature of the Federal reserve districts and is assumed in sections 2, 4, and 9. Of necessity, therefore, when the Federal Reserve Board, in the exercise of its power to readjust, transfers a member bank from one district to another, such transferred bank must cease to be a member of the Federal reserve bank of the district from which it is transferred. When it thus ceases to be a member, the capital of the Federal reserve bank may be reduced; and there is nothing in the act requiring the reduction to be made subject to the maintenance of a minimum capital.

It is to be noted that section 5 provides that the capital stock *shall* be increased and *may* be decreased under the conditions therein mentioned. Succeeding provisions of sections 5, 6, and 9, however, make it clear that *may* is here used in the sense of *shall*, as applied to cases arising under (a), (b), and (c). It seems reasonable to infer that it is used in the same sense as applied to (d). But whether so used or used in its more literal sense is here immaterial, for, so far as the answer to the question submitted is concerned, the result is the same whether the board is *required* or merely *authorized* to reduce the capital when member banks cease to be members.

Nor can any significance be attached to the fact that specific provision is made for reducing the capital stock of a Federal reserve bank in cases arising under (a), (b), and (c), while the act is silent as to cases arising under (d). The cases specifically provided for include cases where the member banks cease to be members as the direct result of their own acts or conduct. Cases under (d) arise where banks cease to be members as an incident of the exercise of the power of the Federal Reserve Board

to readjust districts. The grant of the specific power to readjust carries with it, as fully as if expressed in the act, the power to do what is necessarily incidental. (Broom's Maxims, 7th ed. 505; 199 U. S. 12.)

My conclusion as to the second question submitted is that the Federal reserve act, in prescribing a minimum capitalization of \$4,000,000 for Federal reserve banks as a condition precedent to commencing business, does not require that such minimum capitalization shall be preserved under the circumstances.

Very respectfully,

T. W. GREGORY.

To the PRESIDENT.

GROVER CLEVELAND BIRTHPLACE.

The proposed gift of the Grover Cleveland birthplace at Caldwell, N. J., upon the condition that the property be maintained as a suitable memorial, should not, as a matter of administrative policy, be accepted on behalf of the United States, without the consent of Congress and the President.

DEPARTMENT OF JUSTICE,

April 18, 1916.

SIR: I have the honor to acknowledge your request of the 1st instant for my opinion as to whether or not you have authority to accept the gift on behalf of the United States of the Grover Cleveland birthplace at Caldwell, N. J.

The accompanying papers show that the Grover Cleveland Birthplace Memorial Association, a corporation organized under the laws of New Jersey, wishes the United States to take this property, which it owns without incumbrance, and make of it a public memorial to Mr. Cleveland, the only condition being that it shall be suitably maintained in accordance with the objects set forth in the certificate of incorporation. Of these objects, the third, fourth, and fifth seem the most material, and they include generally the keeping up of the property in every respect so that it may be a suitable and fitting memorial;

the erection by the association or others of a library for the use of the public of the borough of Caldwell; the erection of monuments and additional buildings, and the collection of historical relics.

I pass by, as not necessary for determination, the questions whether section 3736, Revised Statutes, which provides that no land shall be purchased on account of the United States, except under a law authorizing such purchase, applies to a mere donation (as to which there is a difference of opinion), and whether this is a "relinquishment of such tracts" within the meaning of section 2 of "An act for the preservation of American antiquities," approved June 8, 1906 (34 Stat. 225), (as to which see Sen. Rept. 3797, 59th Cong., 1st sess., and Cong. Rec., 59th Cong., 1st ses., p. 7888); because, in my judgment, to accept this gift would violate the spirit of sections 3679, 3732, and 3733, Revised Statutes, which in substance prohibit contracts on behalf of the United States unless they are either authorized by law or under an appropriation adequate to their fulfilment. That a grant which imposes onerous obligations upon the grantee, as does this one, is a contract can not be doubted (*Fletcher v. Peck*, 6 Cranch. 87); and that this one is not authorized by law or under any appropriation is admitted. The fact that an appropriation may be subsequently made only results in making the grant either illusory or no grant at all. (See 4 Op. 490; 5 ib. 15; 13 ib. 465; 15 ib. 235, 240; 19 ib. 50, 54; 21 ib. 537, 540; N. Y. C. & H. R. R. v. U. S., 21 Ct. of Clms. 468, 471.)

In view of the uncertain scope of the power to accept a donation without Congress's authorization, and especially in view of the delicate question arising in this offer because of the obligation that must be assumed in connection therewith, I would suggest, as a matter of administrative policy, that the consent of the Congress, as well as that of the President, should be had.

I have the honor to be, your obedient servant,

T. W. GREGORY.

To the PRESIDENT.

ADMISSION OF CHINESE INTO UNITED STATES.

Paragraph "F" of rule 9 of the Chinese admission regulations, which, in effect, denies citizenship to foreign-born children of American Chinese, is invalid.

Foreign-born children of American-born Chinese fathers are entitled to enter the United States as citizens thereof, notwithstanding the fact that they continued to reside for sometime in China after reaching their majorities, without any affirmative action on their part indicating an intention to remain citizens of the United States.

DEPARTMENT OF JUSTICE,

April 27, 1916.

SIR: I have the honor to acknowledge receipt of your letter of March 14, 1916, with inclosures, wherein you request my opinion upon the following two questions, arising in the cases of Wong Gim Toon and Wong Shing Gim, two Chinese persons who have applied for admission into this country upon the ground that they are citizens of the United States:

"1. Is paragraph "F" of rule 9 of the Chinese regulations, *infra*, which, in effect, denies citizenship to foreign-born children of American Chinese, a valid regulation?

"2. If such rule is not valid, are the above named Chinese entitled to enter the United States as citizens thereof in view of the fact that they continued to reside for some time in China after reaching their majorities without any affirmative action on their part indicating an intention to remain citizens of the United States?"

The essential facts are that one of these Chinamen is 22 years and 11 months of age, and the other 28 years and 6 months; that they are sons of Chinamen who, by reason of their birth in the United States, are citizens of the United States; that under paragraph F of rule 9, *infra*, they have been denied entry by the immigration officers at San Francisco, whose decision is now pending before you on executive appeal.

I regard paragraph F as invalid, and for these reasons:
The pertinent portion reads as follows:

"(f) The Supreme Court having held that a person of the Chinese race born in the United States is a citizen

thereof under the Constitution, and persons of said race not being eligible to become citizens by naturalization, i. e., otherwise than by birth within the limits of the country, but citizens of this country being entitled to the company of their wives and to the care and custody of their children, upon the same theory described in paragraph (a) hereof, the dependent members of the household of a Chinese American citizen may be admitted to the United States without presenting the certificate required by section 6 of the act of July 5, 1884, and the following conditions are prescribed with respect to the proof that shall be exacted in such cases."

Your first question interprets the rule just quoted as denying "citizenship" to foreign-born children of American Chinese.

The statute which confers citizenship upon foreign-born children of citizens of the United States is section 1993, Revised Statutes, which reads as follows:

"All children heretofore born or hereafter born out of the limits and jurisdiction of the United States, whose fathers were or may be at the time of their birth citizens thereof, are declared to be citizens of the United States: but the rights of citizenship shall not descend to children whose fathers never resided in the United States."

It is to be observed that the statute employs the term "*all* children." Under well-established rules of construction, if the statute is to be limited to children other than Chinese, such exception must be made by Congress. It can not be supplied by interpretation. *Mackenzie v. Hare*, 239 U. S. 299; *United States v. Barnow*, 239 U. S. 74; *United States v. Wong Kim Ark*, 169 U. S. 693, 694, 697; *United States v. Portale*, 235 U. S. 27, 30.

It is suggested in the papers submitted by you that authority for so restricting section 1993, Revised Statutes, may be derived from the supposed congressional policy of withholding the privilege of naturalization from Chinese aliens, which policy, it is claimed, is manifested mainly in (1) section 2169, Revised Statutes, restricting naturalization to "free white persons, and to aliens of African nativity, and to persons of African descent;" (2) section 14 of the Chinese exclusion act of May 6, 1882 (22 Stat. 58,

61), forbidding any State or Federal court to "admit Chinese to citizenship," and (3) that portion of the same section providing that all laws in conflict therewith are repealed.

I can not concur in that view. Section 1993 deals specifically with the citizenship of children of citizens, while section 2169 deals with the classes of aliens who may be admitted to citizenship through naturalization proceedings. Moreover, section 1993 appears in the Revised Statutes under the title "Citizenship," while section 2169 appears under the title "Naturalization," and by its own terms is restricted to that title. The two statutes operate in independent fields, and neither one restricts the other.

The legislative history of section 14, *supra*, discloses that it was enacted because some courts had admitted Chinese aliens to citizenship contrary to the true intent of section 2169, and the fact that it is addressed alone to the courts, State and Federal, confirms this view. (Cong. Rec., vol. 13, pp. 1481, 1549, 1586, 1747; Van Dyne on Naturalization, 1907, p. 43.)

Nor does the provision for the repeal of all laws in conflict with the act of which that section forms a part, authorize excepting Chinese children from the operation of section 1993, *supra*. It merely expresses a cardinal principle of construction (*United States v. Tynen*, 11 Wall. 88, 92; *Bird v. United States*, 187 U. S. 118, 125), and was doubtless inserted only out of abundant caution. Its insertion does not, as is argued in the papers submitted by you, assume the existence of some conflicting statute; but conceding *arguendo* that such a result follows, this would not justify construing section 14 as repealing section 1993 in whole or in part, unless "a positive repugnancy" between the two laws is shown (*United States v. Lee Yen Tai*, 185 U. S. 213, 221). No such repugnancy exists, and under elementary rules both statutes must be upheld according to their plain terms.

As adding cogency to the view herein expressed, reference may be made to the opinion rendered to the Secretary of the Treasury by former Attorney General Griggs (23 Op. 345), upon the question whether Chinese persons born or naturalized in the Hawaiian Islands prior to

Grant in his annual message to Congress in 1874. He said, *inter alia*:

"I have again to call the attention of Congress to the unsatisfactory conditions of the existing laws with reference to expatriation *and the election of nationality*. Formerly, amid conflicting opinions and decisions, it was difficult to exactly determine how far the doctrine of perpetual allegiance was applicable to citizens of the United States. Congress, by the act of the 27th of July, 1868, asserted the abstract right of expatriation as a fundamental principle of this Government. Notwithstanding such assertion, and the necessity of frequent application of the principle, no legislation has been had defining what acts or formalities shall work expatriation, or when a citizen shall be deemed to have renounced or to have lost his citizenship. The importance of such definition is obvious. The representatives of the United States in foreign countries are continually called upon to lend their aid and the protection of the United States to persons concerning the good faith or the reality of whose citizenship there is at least great question. In some cases the provisions of the treaties furnish some guide; in others, it seems left to the person claiming the benefits of citizenship, while living in a foreign country, contributing in no manner to the performance of the duties of a citizen of the United States, and without intention at any time to return and undertake those duties, to use the claims of citizenship of the United States simply as a shield from the performance of the obligations of a citizen elsewhere. (Moore's Int. Law Digest, vol. 3, p. 713.)"

The same need for legislation was recognized by former Attorney General Williams in an opinion rendered in 1873 to the President upon the general subject of expatriation. (14 Op. 295, 300.)

In the report on "citizenship, expatriation, and protection abroad," transmitted to Congress in 1906 by the then Secretary of State (H. R. Doc. 326, 59th Cong., 2d sess.), which report appears to have been the genesis of the present so-called expatriation act of 1907, section 6 of

which is above set forth, the previous existing situation is thus outlined at page 26:

"It is held that the duties of a citizen toward the state and of the state toward a citizen are reciprocal obligations, and that the state is not bound to protect one who can not protect it. In refusing protection to a person who is resident abroad without intention of returning to this country one of his rights of citizenship is withdrawn; but if his intention changes and he returns to the United States to reside he may assume at once his right to protection; and, upon satisfying the Secretary of State of his intention to return, he may, if he goes abroad again, receive this Government's document of protection. He may thus really play fast and loose with his nationality, resuming tomorrow rights which he lost yesterday.

"When and under what circumstances it is permissible to assume that the conditions have arisen which require the withdrawal of protection are matters left wholly to the discretion of the Executive, and he has no statute to guide him or support him.

"It is difficult to determine when those who have been absent from the United States for a long time and who give no tangible evidence of an intention of returning should be left without protection. When they are refused they are aware that it is in the discretion of the Executive to accord them protection; they are aware that the policy toward them has not been stable and that one official may grant what another has refused. They do not accept, therefore, a refusal as final, but strain their energies to induce a change of decision, and their cases remain open while their status remains undefined. It seems to be clear that these people have by their own act worked their own expatriation, and that their status should be put beyond the uncertainty or fluctuations of executive policy by a declaratory law."

I have referred *in extenso* to this early history that it might be more readily determined whether there is any persuasive reason for holding that it was the purpose of section 6 of the act of 1907 in making merely future protection dependent upon the person taking the steps therein prescribed, to give sanction to the supposed international

rule which would treat the person who had not taken those steps and continued to reside abroad as thereby electing citizenship in the country in which he so resided.

It is believed the statute invites no such construction. If Congress had intended that loss of citizenship as well as loss of right to further protection should follow from the failure of the person to register at an American consulate upon reaching the age of 18 years their intention to become a resident and remain a citizen of the United States, and to take the oath of allegiance to the United States upon attaining their majority, apt language would have been used by Congress to express that intention. Such a result would not have been left to a rule whose very uncertainty of application contributed in part at least to the enactment of the present statute. Having, therefore, required the person to take the above-described steps merely "in order to receive the *protection* of this Government," there is no escape from the conclusion as stated in *Mackenzie v. Hare*, 239 U. S. 299, 308 (in which the court was urged to construe the third section of the act herein involved contrary to its plain language), that—

"all the reasons that induced its enactment *and all of its purposes* must be supposed to be satisfied and expressed by its words. * * * It would transcend judicial power to insert limitations or conditions upon disputable considerations of reasons which impelled the law, or of conditions to which it might be conjectured it was addressed and intended to accommodate."

This view appears to accord with the administration of the law by the State Department. That department in 1911 issued a circular of instructions to the diplomatic and consular officers stating that the declarations of intention, etc., required by section 6, *supra*, had reference to the right of protection rather than citizenship under municipal law, and that—

"such declarations may be made at any time after the minors concerned have reached the age of eighteen years and before they take the oath of allegiance to the United States,"

and also that—

"the oath of allegiance may be taken within a reasonable time after attaining majority." (Borchard on "Diplomatic Protection of Citizens Abroad," pp. 586, 587.)

An analysis of the whole act of 1907 also fortifies the view herein expressed. To illustrate, section 2 declares what acts shall on the part of "any American citizen" constitute expatriation, and what acts on the part of "any naturalized citizen" shall work a presumptive loss of citizenship. Section 3 provides that "any American woman" who marries a foreigner shall take the nationality of her husband, but with the privilege of resuming her American citizenship upon the termination of the marital relation. Section 4 covers the retention of American citizenship after termination of marital relations by a foreign woman who marries "an American." Section 5 covers the citizenship of children born abroad of alien parents, by virtue of the naturalization of the parent. Section 6 is the one hereinbefore dealt with, and need not be further outlined. We thus see that Congress has provided a complete scheme obviously intended to cover the entire subject, except as it may be altered or modified by Federal law. There is no existing law which so affects section 6, here under consideration.

Respectfully,

T. W. GREGORY.

To the SECRETARY OF LABOR.

STEAMER *TAURUS*—SECTION 14 of SEAMEN'S ACT.

The steam vessel *Taurus*, used in transporting persons for hire from New York City to and from the fishing banks in the Atlantic Ocean from 8 to 10 miles outside the lower bay of New York Harbor, is subject to certain provisions of section 14 of the seamen's act of March 4, 1915 (38 Stat. 1170), relating to life-saving appliances and equipment.

DEPARTMENT OF JUSTICE,

May 5, 1916.

SIR: I have the honor to acknowledge your letter of the 14th instant, requesting my opinion whether the steam vessel *Taurus* is subject to certain provisions of section 14 of the seamen's act of March 4, 1915 (38 Stat. 1164, 1170).

This vessel, for several years before the going into effect of the act, was used in transporting persons for hire from New York City to the fishing banks and return, said banks being in the Atlantic Ocean from 8 to 10 miles outside the lower bay of New York Harbor. She sailed daily, as the weather permitted, leaving the dock at 8.20 a. m. and returning about 4.30 or 5 p. m. "*The route is usually from one to four miles off shore and never more than eight or ten*" (statement of owners). During this time she was seldom outside the harbor limits for more than four hours, about three hours of which was spent at anchor. The crew was employed and paid at a stipulated rate for each trip, and all, with the exception of the watchman, left the vessel each night for their homes. The vessel was annually inspected and certificated as a passenger vessel for bays, harbors, rivers, and coastwise service.

Section 14 of the seamen's act is an additive amendment to section 4488, Revised Statutes. The latter is a part of title 52, a comprehensive code relating to safety of life on navigable waters of the United States. (*Hartranft v. Du Pont*, 118 U. S. 223, 226). The first section of this code (4399) provides that "every vessel propelled in whole or in part by steam shall be deemed a steam-vessel within the meaning of this title." Its second (4400) makes subject to the provisions of the title "all steam vessels navigating any waters of the United States which are common highways of commerce, or open to general or competitive navigation." It provides for the inspection of hulls "of each steam vessel" (4417), of their boilers (4418), the licensing of officers "of all steam vessels" (4438); and also regulates the number of passengers the vessels shall carry (4464). As to life-saving equipment, it first covers "every steam-vessel navigating rivers only" (4481); then provides that "every steamer navigating the ocean, or any lake, bay, or sound of the United States" shall have such number of lifeboats, etc., as will best secure the safety of the persons on board (4488); and finally imposes the duty upon the board of supervising inspectors to determine the character of life-saving equipment best adapted to the circumstances.

There can be no doubt, and, in fact, it seems to be admitted, that the *Taurus* falls within section 4488 before it was amended. The section, as has been said, is part of a comprehensive code regulating safety of life on the navigable waters of the United States, and including every class of vessel propelled by steam (*The Scow No. 1*, 169 Fed. 717; *Revesies v. United States*, 35 Fed. 917, S. C. 37 Fed. 447) except those falling within the principle *de minimis* (*United States v. Guess*, 48 Fed. 587). Section 4481 prescribes life-saving equipment for "every steam-vessel navigating rivers only," and section 4488 completes the category of possible vessels by providing for "every steamer navigating the ocean, or any lake, bay, or sound of the United States." The *Taurus* clearly falls within the latter class. Her certificate is really enough on this point. (*The Hazel Kirke*, 25 Fed. 601, 603; 604.)

Section 4488 provided that, as to every vessel of this class which includes the *Taurus*, the board of supervising inspectors should determine by regulations the character of the life-saving equipment. Section 14 of the seamen's act amended the section by restricting this power of the inspectors and providing that it should be subject to certain elaborate limitations and minimum requirements. It did not limit the class of vessels subject to the section. On the contrary, it expressly repeated the class under the same name; "steamers navigating the ocean, or any lake, bay, or sound of the United States." The *Taurus* being within section 4488 as it originally stood, it follows inevitably that she is within the section as amended.

Section 4488 as amended, however, has attached to it a number of specific regulations, and it is in regard to one which appears under the heading "Embarkation of the passengers in the lifeboats and rafts," and is the second paragraph of subdivision (b) thereof, that the specific question in the present case is raised. This regulation provides that "at no moment of its voyage shall any passenger steam vessel of the United States on ocean routes less than twenty nautical miles offshore" have less than a certain life-saving equipment. It is, of course, admitted that the *Taurus* is a "passenger steam vessel of the

United States," but it is denied that, on the facts stated above, she can be correctly described as making a "voyage" "on an ocean route."

Since, however, she is within the main enactment of section 4488 as amended, there is the strongest presumption that she is within the regulations which merely apply the statute; and there is nothing in the language of the above regulation to rebut this presumption. "Voyage," in seafaring language, may mean merely an adventure (*Friend v. Gloucester Ins. Co.*, 113 Mass. 326, 330; *The Brutus*, 2 Gall. 526, 539, 540); but generally it denotes a transit by water from one terminus to another. (*Brown v. Jones*, 2 Gall. 477, 479; *The Brutus*, *supra*; *The John L. Dimmick*, 3 Ware 196, 200; *The Martha*, 1 Blatch. & H. 151, 156; *In re Moncan*, 14 Fed. 44, 46; *The Mary Adelaide Randall*, 93 Fed. 222, 225.) The terminus ad quem need not be a fixed place on land. The term must have a meaning according to circumstances (*La Bourgogne*, 210 U. S. 95, 135), and clearly there may be a "voyage" to fishing banks (*Friend v. Gloucester Ins. Co.*, *supra*; *Burgess v. Equitable Marine Ins. Co.*, 126 Mass. 70, 76, 77.)

"Route" simply indicates the general course pursued on the voyage, and it would be idle to say that the *Taurus* did not follow a "route," and that that "route" was not on the ocean. There can be no doubt that the *Taurus*, as she is within the description of the body of the section as being a steamer navigating the ocean, or any lake, bay, or sound of the United States, is also within the description of the regulation as being a passenger steam vessel which makes a voyage on an ocean route less than 20 nautical miles offshore.

Certain arguments of inconvenience and of injustice are urged, but the statute is too clear to admit of their consideration.

I have the honor to be, your obedient servant,
T. W. GREGORY.

To the SECRETARY OF COMMERCE.

CONTRACT FOR GOVERNMENT SUPPLIES.

It was within the power of the Joint Committee on Printing to make a contract for supplying the Government with so much paper as may be required for the public printing and binding for the period of six months from March 1, 1916, and such contract obligated the contractor to furnish such paper to the limit of the Government's needs during the life of the contract.

The Government has no right to enter into a new contract for any part of the supply covered by the old contract, save as provided in the old contract itself.

The Government can not be compelled to take more than it needs, though that need is less than the amount specified in the schedule or estimates.

DEPARTMENT OF JUSTICE,

June 13, 1916.

SIR: I have the honor to refer to your letter of April 14, 1916, and its inclosures, and, in compliance with your oral request therefor of June 9, 1916, to submit a formal opinion on the questions developed from that letter, as follows:

(1) Whether the contractor, under the contract for public printing supplies hereinafter described, is bound to deliver to the extent of the needs of the Government during the contract period; (2) whether the Government may enter into a new contract for such paper beyond the quantity specifically named in the original contract; and (3) whether the Government, under language such as is found in this contract, would be required to purchase the whole specified quantity, though such quantity was in excess of its needs.

I am of the opinion—

(1) The contract in question was within the power of the Joint Committee on Printing, and obligated the contractor to furnish the paper described to the limit of the Government's needs during the life of the contract.

(2) The Government has no right to enter into a new contract for any part of the supply covered by the old contract, save as provided in the old contract itself; and,

(3) The Government can not be compelled to take more than its needs though that need is less than the amount specified in the schedule or estimates.

The questions arise on the following statutes and facts:

The so-called printing act of January 12, 1895 (28 Stat. 601), among other things, provides:

"Sec. 26. The Public Printer shall, at the beginning of each session of Congress, submit to the Joint Committee on Printing estimates of the quantity of paper of all descriptions which will be required * * * etc.

"Sec. 3. * * * The Public Printer shall, under their (printing committee's) direction, advertise * * * for sealed proposals to furnish * * * paper, as specified in the schedule to be furnished to applicants by the Public Printer, setting forth in detail the quality and quantities required for the public printing.

"Sec. 4. The advertisement shall specify the minimum portions of each quality of paper required * * * but when the minimum portion so specified exceeds, in any case, one thousand reams, it shall state that proposals will be received for one thousand reams or more.

"Sec. 5. * * * they shall not consider any proposal * * * not accompanied by a bond * * * that the bidder * * * if his * * * proposal is accepted, shall enter into a contract to furnish the articles proposed for * * * etc."

The procedure in this case was as follows:

On January 31, 1916, an advertisement was published naming no minimum, as such, but reading—

"Contracts will be entered into for supplying the quantities required, whether more or less than the estimates, for a period of six months or one year, commencing March 1, 1916. * * * The approximate estimated quantities * * * set forth *in detail* in the *schedule* comprise: 305,000 pounds news print paper. * * * Blank proposals containing the instructions, *schedule* and specifications * * * may be obtained by addressing * * * The Public Printer, Washington, D. C." and further stating "award of contracts" to be made to the lowest and best bidder whose bids are "*in conformity with the requirements of the proposals.*"

The blank forms of proposals furnished intending bidders, and which was filled in and returned by the Republic Bag & Paper Co., as its bid and proposal, stated--

"The undersigned * * * hereby propose to supply the Government of the United States with so much of the paper, more or less, embraced in the following schedule, as may be required for the public printing and binding, from March 1, 1916, to February 28, 1917, or for a period of 6 months from March 1, 1916, * * * etc." and under the heading "Instructions" provided—

"QUANTITY AND QUALITY.

"The sub-joined schedule specifies the quantity as nearly as can be estimated but the contractor must furnish the quantity which may be needed, whether more or less than the estimate * * *.

"CONTRACT.

* * * * *

"The successful bidders will be required to enter into a contract to furnish the quantity required, whether more or less than the estimates * * * etc.

"DELIVERY.

* * * * *

"Satisfactory delivery must be made within thirty days * * * after receipt of an order."

Under the heading "Schedule" appeared: "Printing Paper, white news print, Lots 1 and 2, specifications—300,000 pounds * * * six months". And opposite this entry appeared the figures "3¢", inserted by the Republic Bag & Paper Co.

The bond accompanying the proposal as executed by the bag company recited that it was—

"made and executed on the terms and conditions of the said advertisement, instructions, schedule and specifications provided and prescribed to accompany the foregoing and annexed proposal of the above bidder."

The contract obligated the Republic Bag & Paper Co. to furnish all labor and material necessary to manufacture and deliver—

"so much of the estimated quantity as may be ordered * * * whether more or less than the estimates stated in the proposal * * * as more specifically set forth and described in the proposal containing the instructions, schedule and specifications * * * a copy of which * * * is hereto attached and made a part of this contract."

The contract further provided for deliveries from time to time on partial orders each specifying the quantity then desired.

Under the heading "Extras" it was provided—

"No claim for compensation for any additional or extra work or material (*i. e.*, paper) shall be made by or allowed to (* * * the contractor * * *) * * * except as specifically provided in the accompanying proposal form."

There was in the proposal no provision for additional compensation save as implied from the above quoted provisions requiring the furnishing of quantities, if needed, in excess of the schedule estimate.

Under the heading "Default" it was, in that event, provided that the Government—

"shall procure such quantity, or quantities, of paper necessary for the public printing in the manner prescribed by sections 9 and 11"

of the printing act, *supra*.

My reasons for my conclusions, first above stated, are:

As to the power: The requirement of section 4 of the act, that the advertisement should state a minimum, was meant but to indicate to possible bidders what the proposals might involve in a general way. It also suggests somewhat, however, the idea of an unlimited maximum.

The provision that the schedule to be furnished intending bidders shall set forth in detail the quality and quantities required for the public printing does not, in my judgment, limit the power to contract to a specific number of pounds to be guessed at in advance, regardless of the actual needs of the printing operation. It is complied with by the statement in the schedule that the quantity is estimated at a fixed number of pounds, but the amount to be furnished will be less or more, controlled by the actual need during a named period. Such a statement is a

"detail" of quantity. It is no wise uncertain in meaning, and is certain as may be, as to quantity. The maxim "*Id certum est quod certum reddi potest*" applies, in that the bidder knows that the operation itself will determine the exact number of pounds he will be obliged to furnish, and that beyond its needs he can not be held. Of course, if it was intended to contract for but a part of the needed supply within a given period, the part probably could, and if so should, be stated.

Section 3 shows that the purpose of the contract provided for is to secure the periodical supply "required for the public printing." Section 9 makes this even plainer. It provides in case of failure to furnish the contract supply, for a reletting; and, pending the reletting, for a purchase in the open market of "all paper necessary for the public printing"; and further, for a liability on the bond for any increase of cost "in procuring a supply of *such* paper * * * consequent upon *such* default."

If the language as to detail in the schedule were to be read as limiting the power to contract, to a contract for an exact number of pounds, to be specified in advance in the schedule, it would force the Government to guess at its future need and to take that exact number of pounds though its need turned out to be far less; or, on the other hand, it would prohibit it from arranging for more than the named number of pounds, though its need should turn out to be far greater. Thus it would be driven to emergency purchase at advanced prices in the open market under section 11 because of a lack of power to deal in advance with a known condition, i. e., fluctuation of quantity needed for operating purposes.

As to the obligation of the contract: Because the entire "proposal," including the attached instructions, schedule, specifications, etc., is expressly "made a part of this contract" the language in each must be harmonized if possible.

In *Dermott v. Jones*, 2 Wall. 7, the court said:

"The specifications and the instrument to which they are annexed constitute the contract. They make a common context, and must be construed together."

The language in the proposal, specifications, schedule, and bond, extending or restricting the amount to the actual operating needs of the period, is so plain as to be self-interpreting. Unless, therefore, the contract has narrowed these conditions, the duty to furnish according to the needs is clear.

The restrictive contention can be based only on the contract words "so much of the estimated quantity as may be ordered" as limiting the obligation to furnish within the estimated poundage as a maximum. Such a reading is, in the present case, neither necessary nor proper. First, it would oppose the plain language of other parts of the contract, i. e., the proposal and its accompanying papers. This may not be done if any other reasonable reading be possible. Second, it would oppose the plain purpose of the act with regard to the contract, namely, the procurement by competitive bidding of a periodical supply of *all* paper necessary for the public printing. This feature has been considered above. Third, as repeated partial orders were contemplated, the language was framed with this in mind and obligated the Republic Bag & Paper Co. to deliver "*so much*" as each order might call for. The words "of the estimated quantity" are controlled and limited by the following language, namely, "whether more or less than the estimates stated in the proposal," and the further following words—"as more specifically set forth and described in the proposal containing the instructions, schedule, and specifications * * * a copy of which is hereto attached and made a part of this contract."

In other words, the "estimated quantity" to be furnished would be more or less than the number of pounds named in the 3-cent bid, according as the needs of the printing operation during the named six months period might increase or decrease that poundage.

The wording of the contract might have been more apt and in future contracts it should be made as clear in this respect as the language in the instructions, specifications, and proposals; but support for the view that this is the proper reading of the present contract is found in the

case of *Brawley v. United States*, 96 U. S. 168, 172, 173, wherein it is said:

"If, however, the qualifying words are supplemented by other stipulations or conditions which give them a broader scope or a more extensive significancy, then the contract is to be governed by such added stipulations or conditions. As, if it be agreed to furnish so many bushels of wheat, more or less, according to what the party receiving it shall require for the use of his mill, then the contract is not governed by the quantity named, nor by that quantity with slight and unimportant variations, but by what the receiving party shall require for the use of his mill; and the variation from the quantity named will depend upon his discretion and requirements, so long as he acts in good faith. (172.)

"* * * The contract was not for the delivery of any particular lot, or any particular quantity, but to deliver at the post of Fort Pembina eight hundred and eighty cords of wood, 'more or less, as shall be determined to be necessary by the post-commander for the regular supply, in accordance with Army regulations, of the troops and employees of the garrison of said post, for the fiscal year beginning July 1, 1871.' These are the determinative words of the contract, and the quantity designated, eight hundred and eighty cords, is to be regarded merely as an estimate of what the officer making the contract at the time supposed might be required. The substantial engagement was to furnish what should be determined to be necessary by the post-commander for the regular supply for the year, in accordance with Army regulations."

As to the right to newly contract: As the Republic Bag & Paper Co. stands obligated to supply all the news print paper needed for the printing operation during the contract six months period, no new contract should be made with it for any part of that supply. It should be forced to fill the existing contract or put in default thereunder. To put it in default, a delivery order under the contract should be given it. If not complied with the Paper Company should be notified that it has thereby breached its obligation and put itself in default, and thereafter pro-

ceedings for securing another supply and for lodging responsibility for the ensuing damages should be had under the default paragraph of the contract, and also under sections 9, 10, and 11 of the printing act.

As to the right to take less than the minimum named: The third question, for reasons already set forth, has been answered, in the affirmative. The minimum is but an estimate; the *actual* need controls, whether less than, or more than, the minimum specified in the schedule.

Respectfully,

T. W. GREGORY.

To the PRESIDENT.

SALARIES AND PRIVILEGES UNDER PANAMA CANAL ACT.

The money value of the privileges of quarters, light, and fuel should not be taken into consideration in determining the salary or compensation of employees of the Panama Canal, who are appointed and whose salary or compensation is fixed under the provisions of the Panama Canal act of August 24, 1912 (37 Stat. 561).

The term "compensation," as used in section 4 of the Panama Canal act, refers to salary or wages payable to employees as separate and distinct from the privileges or allowances that may be granted them as to quarters, light, and fuel.

DEPARTMENT OF JUSTICE,

June 19, 1916.

SIR: You have submitted to me three questions arising under section 4 of the Panama Canal act, approved August 24, 1912 (37 Stat. 561).

This section authorizes the President, after discontinuing the Isthmian Canal Commission, to complete, govern, and operate the canal through a governor and such other persons as he may deem competent, and provides that in case any person appointed or employed shall be in the military or naval service, the amount of his official salary shall be deducted from the amount of salary or compensation provided by or which shall be fixed under the terms of the act, that the governor be appointed by and with the advice of the Senate, at a salary of \$10,000 a year; and further provides:

"All other persons necessary for the completion, care, management, maintenance, sanitation, government, operation, and protection of the Panama Canal and Canal Zone shall be appointed by the President, or by his authority, removable at his pleasure, and the compensation of such persons shall be fixed by the President, or by his authority, until such time as Congress may by law regulate the same, but *salaries or compensation fixed hereunder by the President shall in no instance exceed by more than twenty-five per centum the salary or compensation paid for the same or similar services to persons employed by the Government in continental United States.*"

In accordance with this section, the President subsequently discontinued the Isthmian Canal Commission, appointed a governor of the Canal Zone, and issued an Executive order providing regulations for the employment of the permanent force of the canal, to take effect April 1, 1914.

The limitation on salaries or compensation italicized in section 4, as quoted above, was modified by the urgent deficiency appropriation act of April 6, 1914 (38 Stat. 330), which provided:

"The wage scale of the persons employed in the construction of the Panama Canal in effect prior to April 1, 1914, shall continue unchanged during the period of actual construction, but not later than June 30, 1916."

It appears that from the beginning of the construction of the canal employees have been furnished quarters, where available, and light and fuel free.

The questions you submit, and upon which you ask my opinion as a guide in fixing salaries or compensation, which, after June 30, 1916, must conform to the above quoted provision of section 4, are as follows:

"1. Should the value of rent, light and fuel, as determined by the Panama Canal act, to persons who are appointed and whose compensation is fixed under the provisions of the Panama Canal act, quoted above, be taken into consideration in determining the salary or compensation which may be fixed for such persons when compared with the salary or compensation paid for the same or

similar services to persons employed by the Government in continental United States, in order to limit the salary or compensation of persons whose compensation is fixed under said act so that it 'shall in no instance exceed by more than twenty-five per centum the salary or compensation paid for the same or similar services to persons employed by the Government in continental United States' within the meaning of the Panama Canal act.

"2. If rent, light and fuel are furnished free to persons who are appointed and whose compensation is fixed under the provisions of the Panama Canal act, quoted above, should their estimated value, as fixed by the Panama Canal, be charged as a part of the salary or compensation, and the salary or compensation be so fixed under the provisions of the Panama Canal act that the amount to be paid in money and the value of rent, light and fuel, when added together, shall not exceed in any instance by more than twenty-five per centum the salary or compensation paid for the same or similar services to persons employed by the Government in continental United States.

"3. If the persons who are appointed and whose compensation is fixed under the provisions of the Panama Canal act, quoted above, are charged for rent, light and fuel, would the President have the right to fix the salary or compensation of such persons high enough so that, after the deduction of the amount paid for rent, fuel and light, the salary or compensation so fixed would not exceed by more than twenty-five per centum the salary or compensation paid for the same or similar services to persons employed by the Government in continental United States."

The answers to these questions would seem to depend upon whether rent, light, and fuel are to be considered as part of the *compensation* of employees of the Panama Canal, within the meaning of the provision quoted above.

The word "compensation" has a meaning broad enough to include any and everything received in return for service done. The word, however, is frequently used in a more restricted sense as the equivalent of pay or salary, apart from other possible compensation by way of allowances,

commutation, or privileges. (*United States v. Mills*, 197 U. S. 223, 227.)

In this frequent use, the term would not be understood to include many favors or benefits enjoyed by employees—such as the granting of passes to railroad employees or the allowance to miners of coal for personal use—usually called privileges, as distinguished from compensation.

The term is found in the act of June 28, 1902 (32 Stat. 481), which authorized the President to cause the canal to be constructed, and, through a commission to be appointed by him, to employ such persons as he might deem necessary and to fix their *compensation*.

Among other privileges granted, canal employees from the beginning of work on the canal have had light and fuel and the use of quarters free of charge, as mentioned above. These privileges, however, do not appear to have been regarded as part of their *compensation*. On the contrary, in the Executive orders of the Presidents, and in the orders and regulations of the commission, promulgated under the authority of the act of 1902, the term appears to have been used as equivalent to salary or wages, and as not embracing the many privileges which the canal employees have enjoyed.

The following are illustrations of this use:

In the civil service classification of the Isthmian Canal, promulgated by the President under date of November 15, 1904, the officers and employees are classified according to “annual salary or *compensation*” in 11 groups, the basis of classification being the salaries payable to them in money.

A provision for *compensation* at a fixed rate and also for use of a furnished dwelling house is found in many Executive orders, e. g., the order of March 16, 1907, directing that “Major Sibert will receive compensation at the rate of \$14,000 per annum * * * Major Sibert be allowed the use of a furnished dwelling house on the Isthmus * * *.”

In the circular headed “General conditions of employment,” authorized at the one hundred and twentieth meeting of the commission, February 13, 1907, the *compensa-*

tion of employees is clearly distinguished from the various privileges granted to them, including free quarters, free medical attention, free transportation back to the United States, etc.

Further, I am informed that prior to 1912 the expenditure for the upkeep of quarters and for furnishing fuel and light was generally paid from the appropriations for material, supplies, equipment, construction, and repair of buildings, and not from the appropriations for payment of labor or employees.

Again, the orders and resolutions of the commission determining the fixed salaries, rate of pay, and scale of wages appear to be entirely independent of resolutions and orders relative to the use of quarters, supplying of light and fuel, and other conditions of employment.

When, therefore, Congress used the term "compensation" in the act of August 24, 1912, it employed a term used in the original act of June 28, 1902, which for 10 years had generally been construed in practice as substantially the equivalent of salary or wages, and as not including the privileges of free quarters, light, and fuel. It is accordingly reasonable to hold that Congress, in using the term in the act of 1912, used it with the meaning which had thus been given to it in practice. (*United States v. Falk*, 204 U. S. 143, 152; *United States v. Hermanos y Compania*, 209 U. S. 337; *Komada & Company v. United States*, 215 U. S. 392.)

The view that the provision in question relates only to compensation in the nature of salary or wages and in no wise affects the privileges that may or may not be granted employees appears to have been taken by the President in issuing the Executive order of January 15, 1915, section 8 of which reads as follows:

"The free use of quarters, free fuel and free electric current are not, under the conditions of employment now governing, a vested or contract right of employees but revocable privileges, which it has been considered advisable to continue until the permanent force was organized. The revocation of these privileges shall not be made the

basis for increasing salaries or wages or otherwise increasing compensation."

From the foregoing I reach the conclusion that the term "compensation," as used in the provision of section 4, quoted above, refers to salary or wages payable to employees as separate and distinct from the privileges or allowances that may be granted them as to quarters, light, and fuel, and that the money value of such privileges is not to be taken into consideration in fixing the salaries of employees in the permanent force of the canal. While, obviously, the question is not free from doubt, I have been influenced in reaching this conclusion by the thought that if Congress had intended to make it impossible for the Government of the Canal Zone to furnish to employees quarters, light, and fuel free of charge—a practice which had long existed and of which Congress had knowledge—it would have employed to that end language more direct, more specific, and perhaps more emphatic than a general limitation upon the compensation of employees.

Accordingly, each of the three questions submitted by you is answered in the negative.

Respectfully,

JOHN W. DAVIS,
Acting Attorney General.

To the SECRETARY OF WAR.

FEDERAL RESERVE BANKS—POSTAL AND MONEY-ORDER FUNDS.

All postal receipts, including *fees only* from the money-order business, are "revenues of the Government" within the meaning of section 15 of the Federal reserve act of December 23, 1913 (38 Stat. 265), and may be deposited in Federal reserve banks or in their member banks.

DEPARTMENT OF JUSTICE,
July 20, 1916.

SIR: I have the honor to acknowledge receipt of your letter of June 26, 1916, wherein you prefer an amended request for my opinion as to whether you may lawfully transfer (1) postal funds and (2) money-order funds to

Federal reserve banks or to their member banks. In connection with your inquiry you outline the administrative practice in handling these funds, as follows:

1. *Money-order funds*.—Until receipts aggregate \$50 they are kept and paid out by the receiving postmasters. An overplus of \$50 or more beyond the reserve, or \$50 or more where a reserve is not allowed, must be deposited with the Treasurer or an assistant treasurer in cases covered by section 3848, Revised Statutes, or with a designated depository in cases covered by section 3847, Revised Statutes. If no assistant treasurer is available, it is sent to a designated central post office.

2. *Other postal revenues*.—Enough is retained by the receiving postmaster to make payments authorized by section 3861, Revised Statutes. The excess is periodically transmitted to a designated central depository postmaster who daily deposits under section 3848, Revised Statutes. After initial transmission they cease to be subject to the order of the receiving postmaster.

The answer to your question depends on the meaning of the words "revenues of the Government" or "any Government funds" found in section 15 of the Federal reserve act of December 23, 1913 (38 Stat. 265), reading so far as material, as follows:

"* * * and the *revenues of the Government* or any part thereof may be deposited in such banks * * *. No public funds of the Philippine Islands, or of the postal savings, or *any* Government funds shall be deposited in the continental United States in any bank not belonging to the system established by this act."

I am of the opinion that all postal receipts, including *fees only* from the money-order business, are "revenues of the Government" within the meaning of the above quoted statute, and that the statute in question empowers you to make the deposit proposed.

My reasons are:

1. Save minor items and postal *savings*, all receipts from postal operations are derived from (a) postage and envelopes, (b) registering fees, (c) dead-letter recoveries, (d) box rents, (e) money-order business, (f) fines and

penalties. (4049, R. S.) Certain miscellaneous items and dead-letter recoveries are specifically referred to as "part of the postal revenues" in section 4050, Revised Statutes, while receipts generally have been variously termed "postal revenues" (sec. 407, R. S., as amended by the act of Jan. 22, 1894, 28 Stat. 28; secs. 3848, 3855, 4042, 4051, and 4053, R. S.); "revenues of the postal service" or "of the post-office department" (secs. 4054, 4057, 3617, R. S.); "money belonging to" or "receipts on account of the postal service" (secs. 3641, 3642, R. S.); "funds" or "funds belonging to the post-office department" (secs. 3845, 4046, 4057, R. S., 225, Penal Code). They are repeatedly classed as "public moneys" (secs. 3641, 3642, 3643, 3646, 3647—as amended by act of May 27, 1908, 35 Stat. 415—and 3615, R. S.), and are so designated by the Comptroller in 17 Comp. Dec. 373, and 22 Comp. Dec. 616—the latter decision quoting the former and itself rendered May 19, 1916.

Previous to the passage of section 15, *supra*, the duties of the receiving postmasters as to the custody and disposition of their office receipts were declared by sections 3846, 3848, and 2861, Revised Statutes; while the duties and power of the Postmaster General were declared by sections 395, 407 as amended, *supra*, 3641, and 3644, Revised Statutes.

As to the manner of accounting, the Comptroller, in his decision of May 19, 1916, *supra*, details the method, both old and new, from which it appears that before the change in 1913 postal funds in the custody of the Treasurer were held, *i. e.*, deposited, in either the Treasury, sub-treasury, or the depositary banks. After that change they were more completely than before in the custody of the Treasurer, though held always for the account of the Post Office Department.

The Treasury Department (General Accounts Division) furnishes the following detail as to the present accounting operation:

Deposits made by postmasters in the subtreasuries or Treasury are debited into the general fund and credited to the Post Office Department account—a single entire ac-

count from which they are withdrawn by warrants drawn against the fund by the Postmaster General.

These moneys so passed into the general fund, though credited to the Post Office Department account, would be regarded in practical operations as moneys held in the *general fund of the Treasury*. There are many other moneys similarly carried; for example, moneys held by the Comptroller of the Currency as agent for creditors of insolvent banks. They are all considered in practice public funds, though of course not available for expenditures by the Secretary of the Treasury, but in this instance only for expenditures by the Postmaster General for the purposes of the Post Office Department; nor are they a part of the balance in the general fund available for expenditure by warrants drawn by the Secretary of the Treasury; none the less are they Government funds.

As to the *earned fees* of the money-order business, they are termed "part of the postal revenues" in sections 4049, 4050, and 4051, *supra*.

Therefore, to read "revenues of the Government or any part thereof" as not comprehending postal revenues, or to read "any Government funds" as not including funds of the postal service, would be to make—as I believe improperly—an exception against the general language of section 15, *supra*. (*United States v. Portale*, 235 U. S. 27, 30.)

2. Whenever, in the earlier legislation, it was desired to exclude postal receipts from the operation of acts dealing with "moneys of the United States" or "all moneys received from whatever source for the use of the United States" it was done by special exception in the nature of a proviso (act of May 28, 1896, 29 Stat. 179, and sec. 3617, R. S.). On the other hand, when it was meant to affect postal receipts the words "public moneys" were used without such exception or proviso (sec. 3615, R. S.).

3. "Revenues" include receipts from the time they first come in. Some such receipts never reach any fund, being spent directly by the postmaster before being covered into the Treasury. The clause as to "revenues" is permissive; that as to "funds" is prohibitive. This prohibi-

tive clause may well be read as requiring deposits in a system bank *only* in the event it shall have been determined to deposit in some bank. It seems to have been so interpreted on June 5, 1916, by the counsel of the Federal Reserve Board (Federal Reserve Bulletin, issue of July 1, 1916, p. 331).

The clause as to "revenues" being permissive as to system banks, and the clause as to "funds" being prohibitive as to outside banks, each operates not to repeal but only to modify section 3848, Revised Statutes, and to the extent of now permitting deposits of distinctly postal revenues in system banks.

4. No question as to the control of either receipts or funds, *i. e.*, the right to say how it shall be expended, can arise under section 15 because that section deals merely with the place where receipts may be kept by whoever shall from time to time have custody thereof. Section 13 of the Federal reserve act (38 Stat. 263) reading "any Federal reserve bank may receive from * * * the United States deposits of current funds * * *, etc.," empowers system banks to receive deposits of postal revenues. Therefore the Postmaster General and the postmasters under him, or whoever from time to time shall have custody thereof, may handle these revenues either under section 3848, Revised Statutes, *i. e.*, by the old method, or under the permissive power given by section 15, *supra*.

Second. *Receipts from money order business other than fees earned.* Though it has been held that such receipts are "public moneys" within the meaning of section 3846, Revised Statutes (*United States v. Fordyce*, 122 Fed. 963), I am not prepared to say that such receipts held for the payment of the money orders themselves are within reach of section 15, *supra*.

The case of *United States v. Norton*, 91 U. S. 568, holding that the "Money order act" is not a "revenue law" within the meaning of section 3, 2 Stat. 290, because not passed to raise revenue for the support of the Government, can have no bearing on the present question, *viz.* whether the receipts from the money order business are any part of the "revenues of the Government" or when transferred

into the Treasury are to be regarded as a "Government fund."

Third. *Guarantee of safety of deposits.* All governmental deposits stand on an equal footing and the provisions dealing with the subject are found in sections 19 and 23 of the Federal reserve act.

Respectfully,

T. W. GREGORY.

TO THE POSTMASTER GENERAL.

CREW SPACE ON VESSELS.

The words "this act" in section 6 of the seamen's act of March 4, 1915 (38 Stat. 1165), which amends section 2 of the shipping act of March 3, 1897 (29 Stat. 688), refer to the said act of 1897.

The requirements as to crew space on vessels, prescribed by section 6 of the act of March 4, 1915, apply to all vessels constructed after the passage of the act of March 3, 1897.

DEPARTMENT OF JUSTICE,

July 26, 1916.

SIR: I have the honor to acknowledge receipt of your letter of May 12, 1916, in which you ask my opinion as to whether the words "this act" in the phrase "the construction of which shall be begun after the passage of this act," appearing in section 6 of the seamen's act of March 4, 1915 (38 Stat. 1165), refer to that act or to the seamen's act of March 3, 1897 (29 Stat., 687).

The pertinent part of section 6 of the seamen's act of 1915 is as follows:

"SEC. 6. That section two of the act entitled 'An act to amend the laws relating to navigation,' approved March third, eighteen hundred and ninety-seven, be, and is hereby, amended to read as follows:

"SEC. 2. That on all merchant vessels of the United States the construction of which shall be begun after the passage of this act, except yachts, pilot boats, or vessels of less than one hundred tons register, every place appropriated to the crew of the vessel shall have a space of not less than one hundred and twenty cubic feet and not less

than sixteen square feet, measured on the floor or deck of that place, * * *.”

This section purports to set out section 2 of the act of 1897 in the very words in which Congress intended it should be expressed after amendment. Section 6 not only recites that the amended section 2 is “to read as follows,” but sets it off from the rest of section 6 by quotation marks and gives it the original section number, to wit, “section 2,” thus showing that the part in quotations was to be inserted in, and considered as an integral part of, the amended act of 1897. We must then construe the act of 1897 as amended by section 6 of the act of 1915 as if originally enacted in that form.

“A statute which is amended is thereafter, and as to all acts subsequently done, to be construed as if *the amendment had always been there*, and the amendment itself so thoroughly becomes a part of the original statute, that it must be construed, in view of the original statute, as it stands after the amendments are introduced and the matters superseded by the amendments eliminated.” (*Blair v. Chicago*, 201 U. S. 400, 475; *People v. Circuit Judge*, 37 Mich. 287; *Moore v. Mausert*, 49 N. Y. 332; *Farrell v. State*, 54 N. J. 421.)

Such construction, if the words used are given their natural and grammatical meaning, will result in interpreting the words “this act” in the phrase “that on all merchant vessels of the United States the construction of which shall be begun after the passage of this act” as referring to the act of 1897, just as the words “section 2” necessarily refer to section 2 of that act. It will be noted that Congress used the words “this act” and not “this amendment.”

Unless there are compelling reasons, recognized by law, why an interpretation should be given to these words different from their ordinary signification, they must be construed to refer to the earlier act, and so to require a larger space for living quarters of sailors upon vessels constructed after the passage of the act of March 3, 1897,

and not only upon those constructed after the passage of the act of 1915.

"The primary and general rule of statutory construction is that the intent of the lawmaker is to be found in the language that he has used. He is presumed to know the meaning of words and the rules of grammar. The courts have no function of legislation and simply seek to ascertain the will of the legislator. It is true there are cases in which the letter of the statute is not deemed controlling, but the cases are few and exceptional, and only arise when there are cogent reasons for believing that the letter does not fully and accurately disclose the intent. No mere omission, no mere failure to provide for contingencies, which it may seem wise to have specifically provided for, justify any judicial addition to the language of the statute." (*United States v. Goldenberg*, 168 U. S., 95, 102; *New Lamp Chimney Co. v. Ansonia Brass & Copper Co.*, 91 U. S., 656, 662-663.)

A construction in conformity with the above rule harmonizes with all other provisions of the act and with its general purposes, as indicated by the title "An act to promote the welfare of American seamen in the merchant marine of the United States; * * *."

The only other possible construction would make the words "this act" refer to the act of 1915. The effect would be to remove all restrictions whatsoever with respect to space allotment upon vessels built prior to 1915, because the act of 1915, in reenacting section 2 of the act of 1897, as amended, did not preserve the existing requirements, but, on the contrary, repealed them by implication, since the later act covers the whole subject of the earlier.

"* * * even where two acts are not in express terms repugnant, yet if the latter act covers the whole subject of the first, and embraces new provisions, plainly showing that it was intended as a substitute for the first act, it will operate as a repeal of that act." (*United States v. Tynen*, 11 Wall., 88, 92; *The Paquete Habana*, 175 U. S., 677, 685.)

Being reduced to this choice, I think the intent of Congress as indicated by the general purposes of the act and by the words actually used, when given their ordinary and

grammatical meaning, is more clearly effectuated by construing the words "this act" to refer to the act of 1897 rather than to the act of 1915.

The fact has not been overlooked that a sentence in the report accompanying the bill upon its submission to the House of Representatives apparently construed these words differently. The language used by the committee in its report, however, can not be made to control the language of the act.

"Whatever was said in the debates on the bill or in the reports concerning it, preceding its enactment or during its enactment, must give way to its language, or, rather, all the reasons that induced its enactment and all of its purposes must be supposed to be satisfied and expressed by its words, and it makes no difference that in discussion some may have been given more prominence than others, seemed more urgent and insistent than others, presented the mischief intended to be remedied more conspicuously than others." (*Mackenzie v. Hare*, 239 U. S., 299, 308.)

It should be borne in mind that the act (sec. 18) afforded ample time to shipowners to make all necessary changes in their vessels.

In my opinion, therefore, the words "this act" should be construed to refer to the act of March 3, 1897, the necessary effect of which will be to make the space requirements of the law apply to all vessels constructed after the passage of that act.

Respectfully,

T. W. GREGORY.

TO THE PRESIDENT.

APPOINTMENT OF ASSISTANT TO DISTRICT ATTORNEY OF
CANAL ZONE.

By virtue of an executive order, dated February 2, 1914, delegating to the Governor of the Canal Zone certain powers of appointment, which were conferred upon the President by section 4 of the Panama Canal act of August 24, 1912 (37 Stat. 561), the Governor has authority to appoint, with such official designation as he may deem proper, an assistant to the district attorney of the Canal Zone.

DEPARTMENT OF JUSTICE,
July 26, 1916.

SIR: I have the honor to acknowledge receipt of your letter of June 2, 1916, requesting my opinion as to whether the Governor of the Canal Zone has authority to appoint an assistant to the district attorney of the Canal Zone.

It appears from the documents transmitted with your letter that the governor has twice assumed to make such an appointment, designating the appointee in the first instance, assistant district attorney, and in the second instance, assistant prosecuting attorney; but that in both instances the district judge of the Canal Zone of his own motion refused to allow the appointee to appear in the district court of the Canal Zone in the capacity in which he had been designated, on the ground that there was no provision of law authorizing the appointment.

By virtue of the laws of the Canal Zone, promulgated by the Isthmian Canal Commission, by the authority of the President (act No. 1, Aug. 16, 1904, secs. 39 and 40, and act No. 8, Sept. 2, 1904), the offices of prosecuting attorney and assistant prosecuting attorney existed at the time of the passage of the Panama Canal act of 1912 (37 Stat. 560).

The Panama Canal act provided for the discontinuance of the organization theretofore existing, the establishment of a permanent force for the operation of the canal, and the reorganization of the government of the Canal Zone. Among the provisions of this act are the following:

"Sec. 2. That all laws, orders, regulations, and ordinances adopted and promulgated in the Canal Zone by order of the President for the government and sanitation of the Canal Zone and the construction of the Panama Canal are hereby ratified and confirmed as valid and binding until Congress shall otherwise provide. * * *"

"Sec. 4. That when * * * the construction of the Panama Canal shall be sufficiently advanced * * * the President is authorized * * * to discontinue the Isthmian Canal Commission, which, together with *the present organization, shall then cease to exist*; and the President is authorized thereafter *to complete, govern, and operate the*

*Panama Canal and govern the Canal Zone, or cause them to be completed, governed, and operated, through a governor of the Panama Canal and such other persons as he may deem competent to discharge the various duties connected with the completion, care, maintenance, sanitation, operation, government, and protection of the canal and Canal Zone * * *. The governor of the Panama Canal shall be appointed by the President, by and with the advice and consent of the Senate * * *. All other persons necessary for the completion, care, management, maintenance, sanitation, government, operation, and protection of the Panama Canal and Canal Zone shall be appointed by the President, or by his authority, removable at his pleasure, and the compensation of such persons shall be fixed by the President, or by his authority, until such time as Congress may by law regulate the same. * * *."*

"Sec. 7. * * *. The President is authorized to determine or cause to be determined what towns shall exist in the Canal Zone and subdivide * * * said Canal Zone into subdivisions * * * so that there shall be situated one town in each subdivision * * *. In each town there shall be a magistrate's court with exclusive original jurisdiction coextensive with the subdivision in which it is situated of all civil cases in which the principal sum claimed does not exceed three hundred dollars, and all criminal cases wherein the punishment that may be imposed shall not exceed a fine of one hundred dollars, or imprisonment not exceeding thirty days, or both, and all violations of police regulations and ordinances and all actions involving possession or title to personal property or the forcible entry and detainer of real estate. Such magistrate shall also hold preliminary investigations in charges of felony and offenses under section ten of this act, and commit or bail in bailable cases to the district court. A sufficient number of magistrates and constables * * * to conduct the business of such courts, shall be appointed by the governor of the Panama Canal * * * and the compensation of such persons shall be fixed by the President, or by his authority * * *. The rules governing said courts and prescribing the duties of said

magistrates and constables * * * shall be established by order of the President. *The governor of the Panama Canal shall appoint all notaries public*, prescribe their powers and duties, their official seal, and the fees to be charged and collected by them.

"SEC. 8. That *there shall be* in the Canal Zone one district court with two divisions * * * and *one district judge* of the said district, who shall hold his court * * * at least once a month in each division. The rules of practice in such district court shall be prescribed or amended by order of the President. The said district court shall have original jurisdiction of all felony cases, of offenses arising under section ten of this act [violations of regulations relating to remaining upon or passing over any part of the Canal Zone, and injuries to or obstructions of the canal], all causes in equity; admiralty and all cases at law involving principal sums exceeding three hundred dollars and all appeals from judgments rendered in magistrate's courts. * * * all other matters and proceedings not herein provided for which are now within the jurisdiction of the Supreme Court of the Canal Zone, of the Circuit Court of the Canal Zone, the District Court of the Canal Zone, or the judges thereof. * * * *There shall be a district attorney and a marshal* for said district. *It shall be the duty of the district attorney to conduct all business, civil and criminal, for the Government, and to advise the governor of the Panama Canal on all legal questions touching the operation of the canal and the administration of civil affairs.* It shall be the duty of the marshal to execute all process of the court, preserve order therein, and do all things incident to the office of marshal. *The district judge, the district attorney, and the marshal shall be appointed by the President, by and with the advice and consent of the Senate* for terms of four years each * * *. *The district judge * * * shall appoint the clerk of said court, and may appoint one assistant when necessary* * * *.

"SEC. 9. That the records of the existing courts and all causes * * * pending therein * * * shall immediately * * * be transferred to such new courts * * *

whereupon *all the existing courts * * * shall cease to exist * * **"

Section 9 also provides for the review of judgments and decrees in specified cases by the Circuit Court of Appeals of the Fifth Circuit, the exercise of this appellate jurisdiction being subject to review by the Supreme Court of the United States, as in other cases authorized by law.

In accordance with this act, the President subsequently discontinued the Isthmian Canal Commission, appointed a governor of the Canal Zone, and a judge, a district attorney, and a marshal of the district court; and the courts created by the act duly went into operation, and those previously established ceased to exist.

Two sources of authority to make the appointment in question have been suggested.

One suggestion is that the authority to appoint an assistant prosecuting attorney conferred by the laws of the Canal Zone, before referred to, was continued in force by section 2 of the Panama Canal act, above quoted, which confirms the laws theretofore adopted and promulgated by order of the President for the government of the Canal Zone; and that by virtue of the prior law, as thus confirmed, an assistant prosecuting attorney may now be appointed.

I can not accept this view. As a consequence of the Panama Canal act, not only was the commission itself discontinued, but, as expressly provided in section 4, the former *organization*, including, of course, the offices and officers of that organization, ceased to exist. In my opinion, therefore, section 2 can not be held to relate to former laws and ordinances prescribing the framework of the government, which was being reconstructed, nor to the offices or officers of the former organization, which under the new act would no longer exist.

Section 4 of the Panama Canal act is the other suggested source of authority. This section authorizes the President to *govern the Canal Zone through a governor and such other persons as he may deem competent*; and provides that the governor shall be appointed by and with the advice and consent of the Senate and that *all other*

persons necessary for the government of the Canal Zone shall be appointed by the President, or by his authority.

Accordingly, it would seem clear that the President is authorized to make the appointment in question unless the power is denied to him by other provisions of the act.

Sections 7 and 8 specifically provide for the appointment of the judge, marshal, and district attorney, who are to be appointed by the President with the advice and consent of the Senate; the clerk of the district court, who is to be appointed by the judge; and the magistrates, constables, and notaries, who are to be appointed by the governor. Various other provisions relating to the judicial establishment are also found in these sections and in section 9.

The act does not expressly limit the personnel of the judicial establishment to the officials designated, and the only specific reference to any assistant or employee is found in the provision that "the district judge shall appoint the clerk, and *may appoint one assistant when necessary.*" (Sec. 8.)

It may be urged, however, that it was intended by sections 7 and 8 to provide a complete judicial establishment without the aid of other provisions of the act; and that the specific mention therein of certain officials is to be construed, under the maxim, *expressio unius est exclusio alterius*, as disclosing the intention of Congress that there should be no officials or employees in the judicial establishment other than those mentioned.

If such were the intention of Congress, the anomalous situation is presented that the district court of the Canal Zone must be operated by the officials named in the act without any assistance whatever, except from one assistant to the clerk, to be appointed when necessary.

So far as I am informed, in the operation of all other courts created by Congress exercising jurisdiction at all similar to that conferred upon the district court of the Canal Zone, it has been considered necessary to furnish assistants of various kinds to the judges, marshals, clerks, and attorneys for the Government. Indeed, in most, if

not all, of such courts it would be physically impossible for the judges, marshals, clerks, and attorneys for the Government to do personally all the work incident to the performance of their respective duties. Authority has accordingly been granted under which, *when necessary*, stenographers and messengers are supplied for judges, deputies and clerical assistants for the marshals and the clerks, and assistants and clerks for the attorneys for the Government. (See Instructions to court officials, promulgated by the Attorney General June 1, 1916, secs. 34, 104, 238, 642, 767; Instructions to the U. S. judges, marshals, etc., for the District of Alaska, promulgated Jan. 1, 1911, under authority of act of June 6, 1900 (31 Stat. 321), secs. 85-146, 1064-1070, 1253.)

The range of the duties imposed upon the district attorney for the Canal Zone is peculiarly wide and varied. The Panama Canal act requires him "to conduct all business, civil and criminal, for the Government; and to advise the governor on all legal questions touching the operation of the canal and the administration of civil affairs." (Sec. 8.)

From other provisions it appears that the "conduct of business * * * for the Government" with which he is charged includes conducting civil cases for the Government in all the courts of the Canal Zone; conducting in the district court prosecutions of felonies and of offences arising under section 10 (which relates to injuries to and obstructions of the canal, and violations of regulations as to rights of persons to remain upon and pass through the Canal Zone); and conducting in the magistrates' courts prosecutions of misdemeanors and all violations of police regulations and ordinances, as well as preliminary investigations in charges of felony and offences under section 10. (Secs. 7 and 8.) The questions as to which he may be called upon by the governor for advice obviously may be almost infinite in number and variety.

It is hardly conceivable that Congress could have intended that the district attorney for the Canal Zone should personally perform all the work incident to the numerous

duties thus imposed upon him without any assistance whatever. Clearly the act ought not to be so construed unless the intention of Congress is clear and unmistakable to that effect.

The construction of the law which denies to the governor the power to appoint an assistant district attorney is reached by reading the sections relating to the judicial establishment as if they were disconnected from other provisions of the act and complete in themselves.

If, however, sections 4, 7, and 8 are read together, each in the light of the others, section 4 may be construed as establishing a general rule for the appointment of all persons that may be found *necessary* for the government of the Canal Zone, and sections 7 and 8 as excepting from the operation of this general rule the officials of the judicial establishment therein specifically and absolutely provided for, and as leaving the appointment of all other *necessary* assistants and employees, with one exception, to be controlled by the general rule. The one exception is that an assistant to the clerk, *when necessary*, is to be appointed by the judge.

This seems to me the more reasonable construction of the provisions in question. So read, they stand harmoniously together, and the general provision of section 4 authorizes the appointment, in addition to the officials specifically provided for by sections 7 and 8, of such assistants and employees as may be found necessary, including an assistant to the district attorney.

The broad power of making appointments conferred upon the President by the provisions of section 4, limited by the provisions of sections 7 and 8 as above explained, was delegated to the governor by an executive order of the President, dated February 2, 1914, in which it was provided that "all appointments shall be made by the Governor of the Panama Canal or by his authority, except the district judge, district attorney, marshal, clerk of the district court, and his assistant."

It follows, in my opinion, that the governor of the Canal Zone has authority to appoint, with such official designa-

tion as he may deem proper, an assistant to the district attorney.

Respectfully,

T. W. GREGORY.

TO THE SECRETARY OF WAR.

COMMITMENT TO GOVERNMENT HOSPITAL FOR THE
INSANE.

On December 3, 1914, Ernest Angelini was sentenced to 18 months' imprisonment for a fraudulent use of the mails, and by reason of good-time deduction was entitled to be discharged from imprisonment on February 15, 1916; therefore the order of the Secretary of the Interior of February 21, 1916, directing his transfer from the United States penitentiary at Leavenworth, Kans., to the Government Hospital for the Insane, at Washington, D. C., is not sufficient authority for his detention in the latter institution.

Upon the expiration of Angelini's term of imprisonment (Feb. 15, 1916), he became entitled to be fully discharged from Federal control and custody, but thereafter he was subject to the insanity laws and processes of the State, Territory, or district wherein he might be found and accused of insanity.

The Attorney General declines to express an opinion upon the question propounded by the Secretary of the Interior as to the legality of commitment or detention of alleged insane persons under certain other designated acts of Congress, and as to whether those acts comply with the constitutional requirements as to due process of law, for the reason that no concrete case involving those statutes appears to be pending or requiring administrative action in his Department.

DEPARTMENT OF JUSTICE,

August 5, 1916.

SIR: I have the honor to acknowledge receipt of your letter of June 29, 1916, wherein you ask my opinion as to whether your order of February 21, 1916, directing the transfer of Ernest Angelini from the United States penitentiary at Leavenworth, Kans., to the Government Hospital for the Insane, at Washington, D. C., is a sufficient authority for his present detention in the latter institution.

I am of opinion that it is not, and for these reasons.

I assume the following facts existed at the date of your order:

On December 3, 1914, Angelini had been sentenced by the United States District Court for the Eastern District

of Wisconsin for violation of section 215 of the Penal Code (use of the mails to defraud) to 18 months' imprisonment, and thereafter taken to Leavenworth and imprisoned.

Section 1 of the act of June 21, 1902 (32 Stat., 397), provides that a prisoner "whose record of conduct shows that he has faithfully observed all the rules and has not been subject to punishment, *shall be entitled* to a deduction from the term of his sentence to be estimated as follows, * * *, etc."

By reason of deduction earned under this statute Angelini was entitled to be discharged and would have been discharged from imprisonment on February 15, 1916; but on February 10, 1916—having been for sometime prior thereto under observation on suspicion of insanity—he was by two physicians pronounced insane. Effort was made to find friends willing to receive him on discharge. On February 14, 1916, and before he could be so surrendered he became a dangerous maniac. On February 16, 1916, I requested you to authorize his transfer to the above hospital under section 1 of the act of June 23, 1874 (18 Stat. 251), as amended by the act of August 7, 1882 (22 Stat. 330). reading:

"That upon the application of the Attorney General the Secretary of the Interior be, and he is hereby, authorized and directed to transfer to the Government Hospital for the Insane in the District of Columbia all persons who, having been charged with offenses against the United States, *are in the actual custody of its officers*, and all persons who have been or shall be convicted of any offense in a court of the United States and are imprisoned in any State prison or penitentiary of any State or Territory, and *who during the term of their imprisonment have or shall become and be insane.*"

You ordered the transfer on February 21, as above, and pursuant thereto Angelini was received at the hospital on February 28, and has been since there confined.

The good time deduction here earned constitutes a statutory shortening of the sentence. Being detained by the warden after February 15, Angelini might have prosecuted habeas corpus proceedings for his discharge from Federal

custody, though he would have been subject to lunacy proceedings under the laws of Kansas.

The purpose of the act of 1882, *supra*, was to secure proper treatment for insane prisoners—"during the term of their imprisonment"—not to prolong that imprisonment. The word "term" must be held to mean the period during which a prisoner could be lawfully held in confinement because of the criminal charge or sentence. Longer detention could only be justified here because of alleged insanity; but detention for insanity must be pursuant to law, which law must provide for notice and proper hearing on that issue. *Simon v. Craft*, 182 U. S. 427. The above statute does not pretend to provide for any such hearing. It only authorizes a "transfer"; *i. e.*, a change of the *place* of lawful custody. To read it as authorizing your order of February 21, *supra*—made after the expiration of the term of imprisonment—would be, if not to make it unconstitutional, at least to invite grave question as to its constitutionality. Such a reading if possible, should be avoided. *United States v. Jin Fuey Moy*, 241 U. S. 394. Here it may be easily avoided; indeed, it would be difficult to so read it.

Had Angelini not earned any good time deduction the order would have been valid and would have authorized his detention in the hospital for the balance of the 18 months' term. But because of the good time earned Angelini became entitled on February 15 to be fully discharged from Federal custody and control. Thereafter, like any other citizen, he was subject to the insanity laws and processes of the State, Territory, or district wherein he might be found and accused of insanity. If he is now unsafe to be at large proceedings should be forthwith instituted under the laws of the District of Columbia to determine his insanity.

Your second inquiry as to the general question of legality of commitment or detention of alleged insane persons under other acts of Congress to which you refer, and as to whether those acts comply with the constitutional requirements as to due process of law, I may not answer as no concrete case involving those statutes appears to be pend-

ing and requiring administrative action in your department. (25 Op. 183, 584; 27 Op. 49, 50; 28 Op. 129, 130; 29 Op. 46, 293.)

Respectfully,

T. W. GREGORY.

TO THE SECRETARY OF THE INTERIOR.

FORT SABINE MILITARY RESERVATION.

The limitation provisions of the acts of March 3, 1891, section 8 (26 Stat. 1099), and March 2, 1896, section 1 (29 Stat. 42), respecting suits to annul patents, relate to patents only; they do not apply to a conveyance effected by an approval and certification by the Land Department of a list of State selections.

While section 2449 Revised Statutes does not govern the case of a grant which provides for vesting title through approval by the Secretary of the Interior, such as the Louisiana swamp land grant of March 2, 1849 (9 Stat. 352), *quære* whether under the practice of his Department, his approval is not to be taken as tentative merely, and subject to revocation until the approval list has been certified under that section.

The land belonging to the Fort Sabine Military Reservation was impliedly excepted from the grant of swamp lands made to the State of Louisiana by the act of 1849, *supra*; and an approval and certification of it, though occurring after the reservation was abandoned and had become subject to cash sale under the act of February 24, 1871 (16 Stat. 430), was void on its face and passed no title.

The act of March 2, 1896, *supra*, extending the time for annulling land patents, including section 3 thereof, relating to the investigation of claims of bona fide purchasers, applies only to railroad and wagon grants, and has no application to swamp land or other grants.

DEPARTMENT OF JUSTICE,

August 18, 1916.

SIR: For some time there has been pending before this Department your request for an opinion upon questions arising from the following state of facts:

The Fort Sabine Military Reservation in Louisiana was established by Executive order of December 20, 1838. The act of March 2, 1849 (9 Stat. 352), granted to the State of Louisiana "the whole of those swamp and overflowed lands,

which may be or are found unfit for cultivation." Section 2 provides that such lands shall be identified and listed under the direction of the surveyor general for Louisiana, and that, upon approval of such list by the Secretary of the Treasury (since succeeded in that function by the Secretary of the Interior), "the fee simple to said lands shall vest in the said State of Louisiana."

The act of September 28, 1850 (9 Stat. 519), which made a similar grant to the State of Arkansas and "each of the other States of the Union," provided that a list of the swamp and overflowed lands be made out by the Secretary of the Interior and by him transmitted to the governor of the State; and further, that at the request of the governor, the Secretary should issue patent. It declares that "on that patent the fee simple to said lands shall vest in the said State."

On March 25, 1871, the military reservation was abandoned pursuant to the act of February 24, 1871 (16 Stat. 430). That act authorized the Secretary of War to transfer certain military reservations, including the Fort Sabine, "to the custody and control of the Secretary of the Interior, for disposition for cash, according to the existing laws of the United States relating to the public lands, after appraisement, to the highest bidder." The act also specially authorized the Secretary of the Interior to cause such military reservations "to be subdivided into tracts less than forty acres each, or into town lots," and provided that after the offer of each subdivision for sale at public outcry, "any unsold land or lot shall be subject to sale at private entry for the appraised value, at the proper land office," and that improvements should be appraised and paid for at the appraised value, "under such regulations as may be prescribed by the said Secretary."

On July 1, 1884, the then Acting Secretary of the Interior approved "No. 26, a list of the swamp and overflowed lands selected as inuring to the State of Louisiana," aggregating 11,907.41 acres, and comprising the whole of said reservation except one school section, a few small subdivisions lying upon a ridge, and 6,497 acres embraced in a later list, No. 51. This action seems to have been the

result of inadvertence and mistake. (See 21 L. D. at p. 359; 33 L. D. at p. 14.)

On December 10, 1895, list No. 51 was approved by the Secretary, pursuant to his decision rendered October 31, 1895 (21 L. D. 357), in which decision it was held that swamp and overflowed lands within the reservations were granted to the State under the acts of 1849 and 1850, subject to the reservation uses of the United States; that the grant took effect on abandonment of the reservation under the act of 1871, and that the act of 1871 did not intend to make any disposition of such lands inconsistent with the title previously granted to the State.

On May 20, 1901, the Commissioner of the General Land Office questioned the right of the State to the lands embraced in list No. 51, and requested to be advised by your Department whether they "should be certified and patented to the State." Thereupon a hearing was ordered upon notice to the State, resulting in the departmental decision of June 6, 1904 (33 L. D. 13), which held that the grants of 1849 and 1850 were *in praesenti*, operating as of their respective dates, if at all, and therefore not operating as to swamp and overflowed lands within the reservation upon its abandonment in 1871. The prior approval was thereupon "recalled and vacated" and the lands "held for disposition as provided by law."

No action appears to have been taken looking to a recall or revocation of the approved list No. 26, apparently because it had been certified to the State by the commissioner, whereas list No. 51 had not been so certified but only approved by the Secretary for certification by the commissioner. (21 L. D. 357, 360.)

After the departmental decision of June 6, 1904, the State filed a bill in the Supreme Court against the Secretary to restrain other disposition of the land embraced in list No. 51, claiming title under the grant of 1849 and the approval of the list by the Secretary on December 10, 1895. The court, though rejecting a contention that the act of 1850 had so superseded the act of 1849 as to require a patent instead of a mere approval to pass title to swamp lands in Louisiana, held that the lands within the Fort

Sabine Military Reservation were impliedly excepted from the grant of 1849; that "the approval proceeded upon a manifest mistake of law, that upon the abandonment of the military reservation the lands fell within the terms of the grant of 1849;" and that "therefore it was void upon its face."

Referring to the limitation statute of March 3, 1891 (sec. 8, 26 Stat. 1099), a doubt was expressed as to "whether Louisiana has not now a good title by the lapse of five years since the approval and by the operation of that act." As to this it was held that its solution raised questions of law and fact upon which the United States had a right to be heard, that the United States was therefore a necessary party, and that this required a dismissal of the bill for lack of jurisdiction. (*Louisiana v. Garfield*, 211 U. S. 70, 76-78.)

You state that the Government surveys have not been extended over these lands and that the Commissioner of the General Land Office has requested instructions from your Department as to the survey and disposition thereof. You therefore desire an opinion upon the following questions:

(1) Whether the provisions of the act of March 3, 1891, limiting suits by the United States to vacate patents to five years, apply to certifications as well as patents.

(2) Whether, in view of the provisions of the act of August 3, 1854 (10 Stat. 346), and the direction given as to the disposition of these particular lands by said act of 1871, they may be disposed of by the land department without reference to said certification.

(3) Whether, in view of the fact that these lands have probably been sold by the State and purchased from it upon the faith of such certification, the limitation act of March 2, 1896 (29 Stat. 42), applies to certifications as well as patents, and particularly whether section 3 of that act is applicable to certifications under grants other than railroad and wagon-road grants.

1. The statute of limitations referred to in the first question provides:

"That suits by the United States to vacate and annul any *patent* heretofore issued shall only be brought within five years from the passage of this act, and suits to vacate and annul *patents* hereafter issued shall only be brought within six years after the date of the issuance of such *patents*." (26 Stat. 1099, sec. 8; *ib.* 1093.)

In *United States v. Winona & St. Peter R. R. Co.* (165 U. S. 463, 476), a suit brought to set aside an erroneous certification of lands, there are observations to the effect that this statute, as well as the act of March 2, 1896 (29 Stat. 42), which extended the time in respect of patents erroneously issued under railroad and wagon-road grants, was intended to apply to suits concerning certifications. This question, however, was not involved in the case and the observations referred to must therefore be classed as *dicta*. In the *Garfield* case, as above stated, the court suggested a doubt, but expressly refrained from passing upon it. Conceding that there is doubt, and conceding that, as a general proposition, statutes of limitation should not be pared down by narrow constructions, I am yet of the opinion that, in the absence of an authoritative construction by the judiciary, the meaning of this enactment should be gathered from its terms rather than from broad inferences concerning its policy. It is true that an approval or certification may perform the same function as a patent, where granting acts intend that title shall be transferred in those ways; and, to that extent, they may be said to fall within the reason, though not within the letter of this act of limitation. If we were at liberty to assume that the object of Congress was to extend repose, after the periods named (and in the absence of concealed fraud) to all titles of whatsoever character emanating from the United States, we might be justified in accepting "patent" as a generic designation for every possible form of grant. This assumption, however, can derive no support from the term patent itself, since that is a term of very specific meaning in the land laws, signifying an instrument of especial solemnity signed in the name of the President, countersigned by the recorder of the General Land Office, sealed with the seal of that office, and which takes effect when

there recorded in books especially provided for the purpose. (*United States v. Schurz*, 102 U. S. 378, 403; R. S. secs. 450, 451, 458, 459.) The term is never used as an equivalent for "conveyance." Moreover, the other sections of the act of March 3, 1891, in nowise assist us toward enlarging the natural meaning of the section in question. As a whole, the act, besides making provisions for certain rights of way and forest and other reservations, is occupied in repealing, revising, and adding to the kind of general land laws, such as the timber culture, townsite, preemption, and homestead laws, which lead to entries and patents. It refers to entries and patents repeatedly, but never to selections, or approvals, or certifications, or to the species of laws which involve them. Doubtless, in enacting section 8, the attention of Congress was addressed to the protection of the kind of titles to which the other portions of the statute so directly related. This view is confirmed by section 7, which protects *bona fide* purchases and incumbrances made after final entry, and directs that patents shall issue to entrymen after the lapse of two years from the issuance of receiver's receipt, but confines both of these provisions to entries made under the homestead, timber culture, desert land, or preemption laws, or under the act itself.

The solemnity of patents, the unusual formalities involved in their production, and the fact that they wear the dignity and extend the assurance of the Government in a degree not approached by any other form of Executive conveyance, may well have supplied sufficient reason to Congress for confining this limitation to them, instead of extending it to the looser and less ceremonious certifications and approvals. I conclude that the limitation does not apply to the case in hand.

2. The second question is whether in view of the act of August 3, 1854 (10 Stat. 346; R. S. §2449), and the act of 1871, *supra*, these lands may be disposed of without reference to the certification. As appears by the statement of facts, list 26, including part of the lands, was approved by the Acting Secretary and certified by the commissioner, and list 51, including the remainder, was ap-

proved by the Secretary but not actually certified. In an opinion dated November 19, 1915, concerning indemnity school land selections in Colorado, I advised you that the act of 1854 does not govern in the case of a grant which provides for the vesting of title by approval of the Secretary. Such a grant is the Louisiana swamp land grant of March 2, 1849, *supra*. If the Acting Secretary and the Secretary possessed the power and jurisdiction, by approving lists 26 and 51 respectively, to pass the legal title (erroneously) to the State, the significance of the certification in the one case, and its absence in the other, comes not from the act of 1854 but from the practice of your department in such cases. From what is said in 33 Land Decisions, 13, 17, and from other reliable sources, I gather that for many years approvals such as these have been treated as provisional and subject to revocation until copies of the approved lists have been formally certified under seal by the commissioner. If this be so, it may well be said that, whatever its potentiality, the approval of the second list never became effective because it was never promulgated in accord with the recognized departmental practice. As was said in the Land Decision just referred to:

"There must be a delivery of the instrument which conveys title before jurisdiction is divested. In the case of a patent to public lands, the recording of the instrument is the equivalent of its delivery. *United States v. Schurz* (102 U. S. 378). By analogy it would seem that in the case of an approved list the certification is the equivalent of delivery, and until certification the title remains in the United States. In other words, until the list is formally certified by the officer charged with that duty, it in law remains in the hands of the Secretary of the Interior, and that officer may revoke his approval."

This question was not passed upon in *Louisiana v. Garfield*. But, for a more fundamental reason, I conclude that neither list 51, which was not certified, nor list 26, which was, availed to pass title out of the United States.

This land was impliedly excepted from the grant in the act of 1849 because it lay within a military reservation at that time. The only authority for passing the title by

approval was contained in that act, and it did not extend to this land. Therefore, the approval, as held by the Supreme Court in the *Garfield* case, was "void upon its face."

It is true the court held in the case of *United States v. Chandler-Dunbar Co.*, 209 U. S. 447, 450, that "the statute presupposes an instrument that might be declared void," but it was also pointed out in that case that the land, "whether reserved or not, was public land of the United States and in kind open to sale and conveyance through the Land Department." At the time of the passage of the granting act of 1849, this land was not open to sale or conveyance in any manner, but was reserved for military purposes and was under the jurisdiction of the War Department. The land became "open to sale and conveyance through the Land Department" upon abandonment of the reservation under the act of February 24, 1871 (16 Stat. 430), but by sale for cash and conveyance by patent under that act, not by selection and approval as swamp land under the act of 1849. If, after the abandonment under the act of 1871, a patent had been issued, the case might come within the principle of the *Chandler-Dunbar* case. But an approval based on the swamp land grant was, as the courts said in the *Garfield* case, "a mere void approval on paper."

3. The third question is whether, in view of the fact that these lands have probably been sold by the State and purchased from it upon the faith of such certification, the limitation act of March 2, 1896 (29 Stat., 42), applies to certifications as well as patents; and, particularly, whether section 3 of that act is applicable to certifications under grants other than railroad and wagon road grants.

As to the first branch of the question, it is to be observed that the limitation in the first section of the act of March 2, 1896, like the limitation in the act of 1891, refers only to suits to annul patents; and, for the reasons heretofore given, I do not feel justified in construing it as extending to certifications or approvals.

As to the second branch, I am persuaded that the act of 1896, including section 3, relates only to railroad and

wagon road grants, and has no application to swamp land or other grants.

It is true that the title of the act is broad enough to embrace legislation for extending the period of limitation as to all kinds of land patents; but the real subject matter and scope of the act is defined, I think, in the first sentence of section 1, which relates only to any patent issued under "a railroad or wagon road grant," and extends the limitation period "as to the patents herein referred to." The language used in the rest of the section is especially pertinent to patents and grants of that character, though, if considered without reference to the first sentence, it could be given a broader application. The same is true of sections 2 and 3, and it will be noted that in the last sentence of section 2 railroad grants and the railroad adjustment act of 1887 (24 Stat. 556) are specifically referred to. The purpose of these two sections is to protect the rights of innocent purchasers; and a careful comparison of their provisions with the cognate provisions of the railroad adjustment act of 1887 indicates, in my judgment, that the main purpose of the later act was to facilitate the adjustment of railroad grants in accordance with the purposes of the original act, and also to provide, by express inclusion, for the adjustment of wagon road grants.

While this conclusion is not wholly free from doubt, I think it follows from a close analysis of these intimately related laws, and undoubtedly it receives strong confirmation from the legislative history of, and the well known occasion for, the later enactment. No authority which is opposed to this conclusion has been brought to my attention. The statement in *United States v. Norris*, 222 Fed., 14, 21, and *United States v. Pitan*, 224 Fed., 604, 610, to the effect that the act of 1896 may have a more general application, must be classed as *dicta*. I should not feel justified in according them controlling weight.

Very respectfully,

T. W. GREGORY.

TO THE SECRETARY OF THE INTERIOR.

NATIONAL FORESTS—FOREIGN CORPORATIONS.

The Crescent Mining Co., a corporation organized and existing under the laws of Canada, is not entitled to a water power permit within the Okanogan National Forest in the State of Washington.

DEPARTMENT OF JUSTICE,

August 24, 1916.

SIR: By letter of June 7, 1916, you state that the Crescent Mining Co., a corporation organized and existing under the laws of the Province of Manitoba, Canada, is maintaining a small power plant within the Okanogan National Forest, Wash.; and in your letter of July 21, 1916, you say that this corporation has applied to your department "for a permit." This application, I assume, is for permission to maintain and operate the company's plant; and you request an opinion as to "whether a corporation organized and existing under the laws of Canada may be granted a water power permit within a national forest in the State of Washington."

The pertinent provisions of the acts of Congress relating to the question are as follows:

Act of June 4, 1897 (30 Stat. 11, 35):

"The Secretary of the Interior (now the Secretary of Agriculture) shall make provisions for the protection against destruction by fire and depredations upon the public forests and forest reservations which may have been set aside or which may be hereafter set aside under the said act of March third, eighteen hundred and ninety-one, and which may be continued; and he may make such rules and regulations and establish such service as will insure the objects of such reservations, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction; * * *."

Act of February 15, 1901 (31 Stat. 790):

"The Secretary of the Interior * * * is authorized and empowered, under general regulations to be fixed by him, to permit the use of rights of way through the public lands, forest and other reservations of the United States, and the Yosemite, Sequoia, and General Grant National Parks, California, for electrical plants, poles, and lines for

the generation and distribution of electrical power, and for telephone and telegraph purposes, and for canals, ditches, pipes and pipe lines, flumes, tunnels, or other water conduits, and for water plants, dams, and reservoirs used to promote irrigation or mining or quarrying, or the manufacturing or cutting of timber or lumber, or the supplying of water for domestic, public, or any other beneficial uses to the extent of the ground occupied by such canals, ditches, flumes, tunnels, reservoirs, or other water conduits or water plants, or electrical or other works permitted hereunder, and not to exceed fifty feet on each side of the marginal limits thereof, or not to exceed fifty feet on each side of the center line of such pipes and pipe lines, electrical, telegraph, and telephone lines and poles, by any citizen, association, or corporation of the United States, where it is intended by such to exercise the use permitted hereunder or any one or more of the purposes herein named: * * *.”

Act of February 1, 1905, section 4 (33 Stat. 628) :

“That rights of way for the construction and maintenance of dams, reservoirs, water plants, ditches, flumes, pipes, tunnels, and canals, within and across the forest reserves of the United States, are hereby granted to citizens and corporations of the United States for municipal or mining purposes, and for the purposes of the milling and reduction of ores, during the period of their beneficial use, under such rules and regulations as may be prescribed by the Secretary of the Interior, and subject to the laws of the State or Territory in which said reserves are respectively situated.”

Act of March 4, 1911 (36 Stat. 1235, 1253) :

“That the head of the department having jurisdiction over the lands be, and he hereby is, authorized and empowered, under general regulations to be fixed by him, to grant an easement for rights of way, for a period not exceeding fifty years from the date of the issuance of such grant, over, across, and upon the public lands, national forests, and reservations of the United States for electrical poles and lines for the transmission and distribution of electrical power, and for poles and lines for telephone and telegraph purposes, to the extent of twenty feet on

each side of the center line of such electrical, telephone, and telegraph lines and poles, to any citizen, association, or corporation of the United States, where it is intended by such to exercise the right of way herein granted for any one or more of the purposes herein named: * * *."

The powers given by the forestry provisions of the act of June 4, 1897, *supra*, to make rules and regulations for the reserves and "regulate their occupancy and use," are expressed in the most broad and general terms. The statute does not particularize as to the kinds of uses or occupancies, or limit in any way the possible beneficiaries thereof. Assuming that this general language invested the Secretary, originally, with power to grant permits for the use of rights of way for such permanent works and structures as are required for hydroelectric power plants, yet there are now in force three statutes of later enactment (quoted above), all applying to the national forests, and all dealing specifically and solely with rights of way—one of them solely with rights of way for electric transmission lines (act of 1911); another solely with rights of way for works for storing, conducting, and using water (act of 1905, sec. 4); and the remaining one specifically, though not solely, with rights of way for works for storing, conducting, and applying water to the purpose of generating electricity and transmitting the current (act of 1901). All of them enumerate the purposes or uses to which the water or electricity may be applied, and two name, among other purposes, that of *mining*, which is the particular use here involved (acts of 1901 and 1905).

Each of these statutes occupies a special field carved out of the comprehensive uses and occupancies embraced by the act of 1897. In the fields to which they relate, their provisions are comprehensive and complete; and in various particulars contain limitations on the powers of the Secretary not found in the act of 1897, among them express provisions in each act confining its benefits to citizens, associations, and corporations of the United States. These acts, therefore, bear to the act of 1897 the relation of special and particular to general legislation, and, being later in time, supersede and repeal it as to the subjects with

which they deal. The intention of Congress is entirely clear that permission to use rights of way for the specific purposes enumerated in these statutes shall be granted only to citizens, associations, and corporations of the United States, and we can not recur to an older and broader statute for the purpose of granting like rights of way to a corporation of a foreign country.

The applicant here is a Canadian mining corporation, and as such not entitled to the benefits of these statutes. It is suggested, however, that in substance and effect the Canadian corporation has become a "corporation of the United States" by reason of its compliance with the laws of the State of Washington prescribing the conditions upon which foreign corporations may acquire the right to do business in that State.

The relevant provisions of the laws of the State of Washington on the rights and liabilities of foreign corporations doing business in that State are contained in sections 3720, 3721, and 3722, of Remington and Ballinger's Annotated Codes and Statutes (ed. 1910), which are substantially as follows:

Section 3720 authorizes corporations organized under the laws of any State or Territory of the United States, or of any foreign country, state or colony, for any of the purposes for which domestic corporations are organized, except the business of dealing in real estate, to sue and be sued in the State courts, to acquire real estate and engage in business generally in the same manner and to the same extent as domestic corporations, on compliance with the provisions of sections 3721 and 3722. It is provided, however, that such corporations shall not be allowed to conduct their business on more favorable terms than domestic corporations, and that, if the majority of their capital stock is owned by aliens, they shall not acquire lands other than for mining purposes, unless under mortgage or in good faith in the collection of debts.

Section 3721 requires that a certified copy of the articles of incorporation be filed in the office of the secretary of state; and section 3722, the appointment of an agent to accept service of process within the State.

It appears that the Crescent Mining Co. has fully complied with the requirements of the last two sections.

This legislation seems to follow the general outline of similar statutes in other States. I fail to see any evidence of a legislative intent to do more than authorize foreign corporations, complying with the conditions, to sue and be sued, and to transact business in their own lines within the State, and to acquire and hold the property and facilities necessary and convenient for that purpose. Under this and similar statutes, the business may be, and usually is, transacted through agents or attorneys resident in the State, and the title to property may be, and usually is, held by the corporation, just as the title to property is held by a nonresident individual.

In the matter of *Keasbey and Mattison Co.* (160 U. S. 221, 229), the Supreme Court said:

"And it is established by the decisions of this court that, within the meaning of this act, a corporation cannot be considered a citizen, an inhabitant, or a resident of a State in which it has not been incorporated; and, consequently, that a corporation incorporated in a State of the Union cannot be compelled to answer to a civil suit, at law or in equity, in a circuit court of the United States, held in another State, *even if the corporation has a usual place of business in that State.*" (*McCormick Co. v. Walthers*, 134 U. S. 41, 43; *Shaw v. Quincy Mining Co.*, 145 U. S. 444; *Southern Pacific Co. v. Denton*, 146 U. S. 202.)

These were decisions under the judiciary act of 1887-88, but they are based on the underlying principle that corporations as legal entities exist only in the States or countries whose laws created them, and do not become corporations or citizens of other States or countries merely because they are permitted to do business there on compliance with prescribed conditions.

In any event, I do not think the State laws are controlling. Congress has almost uniformly limited the benefits of the public land laws to citizens of the United States or persons who have declared their intention to become citizens. The benefits of the right of way legislation now under consideration are expressly limited to citizens, asso-

ciations, or corporations of the United States; and it can not be admitted that the congressional policy to exclude aliens from those benefits is to be overborne by State legislation, however liberal, permitting alien corporations to do business in the State.

The question submitted is therefore answered in the negative.

Very respectfully,

T. W. GREGORY.

TO THE SECRETARY OF AGRICULTURE.



INDEX—DIGEST.

[See also Index to Subjects, p. xiv.]

AGRICULTURE, SECRETARY OF.

AUTHORITY TO GRANT RIGHTS OF WAY. *See* **RIGHTS OF WAY**, 3, 4.

AIR RIFLES. *See* **ARMS AND MUNITIONS OF WAR**, 1.

ALASKA.

1. **Purchase of Line of Railroads.**—The President is authorized, under the act of March 12, 1914 (38 Stat. 305), to obligate the United States to expend, for the purchase of a line of railroads in Alaska necessary to complete the line designated by him, a sum in excess of the existing appropriation by Congress, but within the maximum of the cost as prescribed by the act. 332.
2. **Public Lands.**—Revocable licenses under the act of February 15, 1901 (31 Stat. 790), or easements under the act of March 4, 1911 (36 Stat. 1253), may be granted for the development and transmission of electric power upon public lands situate in Alaska. 387.

ALIENS.

ALIEN LABORERS. *See* **EIGHT-HOUR LAW**, 6.

NONRESIDENT, INCOME TAX. *See* **INCOME TAX**, 1, 2, 3, 4.

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ST. MARYS RIVER. *See* **VESSELS**, 4.

ANTITRUST LAWS.

1. **Panama Canal.**—Under the provisions of section 11 of the Panama Canal act of August 24, 1912 (37 Stat. 567), the question whether the person or corporation who owns, operates, or controls any vessel seeking passage through the canal is doing business in violation of the antitrust laws is to be determined by the final judgment or decree of a court of the United States of competent jurisdiction. 355.

ANTITRUST LAWS—Continued.

2. *Same.*—Where a vessel seeking passage through the canal is owned or operated by persons against whom no judgment that they have violated the antitrust laws has been rendered by a court of competent jurisdiction, there is upon the officials of the canal no duty to refuse to permit the vessel to pass. 355.
3. *Same.*—Where the vessel is operated or controlled by a person or company against whom a judgment has been rendered under the antitrust laws in a court of competent jurisdiction, if the proceeding was at the instance of the United States and resulted in a decree designed to restore competitive conditions, and no question has been raised by the United States in appropriate judicial proceedings as to noncompliance with such decree, it should not be refused passage through the canal. 355.
4. *Same.*—Should a case come to the attention of the canal authorities, where the judgment was a conviction under the criminal sections of the Sherman law or was a judgment in a suit brought by private parties, they might well require some affirmative showing by affidavit or otherwise that the violations had ceased. 355.
5. *Railroads.*—**Military Movement of Troops.**—Neither sections 1 or 2 of the Sherman antitrust act of July 2, 1890 (26 Stat. 209) nor section 5 of the act to regulate commerce of February 4, 1887 (24 Stat. 380) prevents the Navy Department from agreeing with many railroads or prevents such railroads from agreeing among themselves that a common agent of the roads may for a definite period direct the routing of Federal troops. 381.

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- ACTING ASSISTANT DENTAL SURGEON, NAVY. *See* NAVY, 1.
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AQUEDUCT BRIDGE, VA.

1. The Government-owned site at the south end of the Aqueduct Bridge, comprising the tract above high-water mark on the Virginia bank of the Potomac River purchased under the act of June 21, 1886 (2 Stat. 84), is under the administrative control and jurisdiction of the Secretary of War. 470.
2. Same.—The Secretary of War has the power to issue a revocable license to the Washington, Arlington & Falls Church Railroad Co., permitting it to occupy with its railroad tracks and appurtenances such portion of said site and in such manner as he may deem advisable for the time being. 470.
3. Same.—The Secretary of War also has the power to issue a revocable license permitting the relocation of the track of the Great Falls & Old Dominion Railroad Co. upon the site in question. 470.

ARLINGTON NATIONAL CEMETERY, VA.

1. Appropriation and Contracts for Memorial Amphitheater.—Section 14 of the act of March 4, 1913, which created a commission to direct the construction of a memorial amphitheater at Arlington National Cemetery, Va., does not authorize any present expenditure, but it does authorize the commission to enter into contracts to the extent of the full cost of the buildings, to wit, \$750,000. 147.
2. Same.—The commission should, at the proper time, submit to Congress, through the Secretary of the Treasury, an estimate of the requirements, together with a report of its action. 147.

ARMS AND MUNITIONS OF WAR.

1. Mexico.—Air Rifles.—Whether certain air rifles are "arms or munitions of war" within the meaning of the joint resolution of Congress passed March 14, 1912, and the President's proclamation of the same date issued in pursuance thereof, is purely a question of fact which the Attorney General does not feel qualified to decide. 9.
2. Same.—Empty Cars and Coal.—Ordinary empty cars belonging to Mexican railways are not "munitions of war" within the meaning of the President's proclamation of October 19, 1915, prohibiting the exportation of such munitions into Mexico. 467.
3. Same.—Coal and coke are not included in the term "munitions of war" as used in the President's proclamation of October 19, 1915. 467.
4. Same.—There is no authority of law (other than the quarantine act) forbidding the importation of cattle and other live

ARMS AND MUNITIONS OF WAR—Continued.

stock from Mexican territory occupied by the revolutionists, the proceeds of which would be used to continue revolutionary activities. 467.

5. *Same.*—Clothes and provisions are not munitions of war within the meaning of the amended joint resolution of March 14, 1912 (37 Stat. 630), prohibiting the export of arms or munitions of war to any American country in which, according to the President's proclamation, conditions of domestic violence exist, which are promoted by the use of such materials. 213 .
6. *Same.*—Exportation of Horses, Riding Saddles, etc.—Ordinary, as distinguished from military, riding saddles, stirrups, girths, hay and other food stuffs, and horses are not munitions of war within the meaning of the amended joint resolution of March 14, 1912 (37 Stat. 630), prohibiting the export of "arms or munitions of war" to any American country in which, according to the President's proclamation, conditions of domestic violence exist which are promoted by the use of such materials.
7. *Same.*—Opinion of April 20, 1912 (29 Op. 394), dissented from. 227.

AMMUNITION. *See also* EIGHT-HOUR LAW, 2.

ARMY.

1. *Officers—Employment of Retired Army Officer as Superintendent of Indian School.*—A retired Army officer, even though receiving upward of \$2,500 per annum, may be employed as superintendent of an Indian school or agency, where no additional compensation is allowed without contravening the provision of the act of February 27, 1906 (34 Stat. 48), which prohibits the Government from accepting voluntary service. 51.
2. *Same.*—The words "voluntary service," as employed in the above-mentioned act, were not intended to cover services rendered in an official capacity under regular appointment to an office otherwise permitted by law to be nonsalaried. 51.
3. *Same.—Promotion.*—The act of October 1, 1890 (26 Stat. 562), regulating the promotion of certain officers of the Army, does not make it obligatory upon the President to promote to a vacancy existing in the grade of lieutenant colonel the senior officer in the next lower grade, if, in his opinion, the record of the officer has been such as to indicate that he is disqualified for promotion. 177.
4. *Same.—Retirement of Army and Navy Officers Serving on the Isthmus of Panama.*—Under the act of March 4, 1915 (38 Stat. 1190), providing for recognizing the services of certain

ARMY—Continued.

officers of the Army, Navy, and Public Health Service for their services in connection with the construction of the Panama Canal, when an officer otherwise within the purview of the act applies for retirement he *must* be retired, and the President has no discretionary authority to postpone the date of retirement to such time as he may deem proper. 406.

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1. Control of Recorder of Deeds Office, D. C.—It would require the sanction of Congress to place the office of the recorder of deeds of the District of Columbia under the administrative control and supervision of the Attorney General. 119.
2. Questions Not Arising in Administration of Department—Commitment of Alleged Insane Persons.—The Attorney General declines to express an opinion upon the question propounded by the Secretary of the Interior as to the legality of commitment or detention of alleged insane persons under certain other designated acts of Congress, and as to whether those acts comply with the constitutional requirements as to due process of law, for the reason that no concrete case involving those statutes appears to be pending or requiring administrative action in his department. 569.
3. Same.—Neutrality.—The Attorney General declines to express an opinion upon the inquiry as to what courses may be followed by the Government to prevent American or foreign vessels from furnishing coal and supplies to belligerent warships at sea, in accordance with the provisions of The Hague Convention, No. 13, of 1907, since the inquiry does not present an actually existing case arising in the administration of an executive department and apparently calls for an opinion in advance as to what this department would hold in the future under indefinite and varying facts. 316.
4. Questions Too General to Be Answered—Military Movement of Troops.—Whether the proposed agreement of the Navy Department for the routing of Federal troops would be contrary to public policy as judicially construed, and whether such agreement, if entered into, could be enforced by the courts, are questions which can not be answered because they are too general, and for the further reason that it involves a speculation as to future judicial action. 381.

ATTORNEY GENERAL—Continued.

5. **Recess Appointment.—Salary.**—The question whether appointee can be paid the salary of the office before confirmation by the Senate should be referred to the Comptroller of the Treasury for determination, as this is a matter which would naturally come before him, and as to which the opinion of the Attorney General would only be advisory. 314.

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BLACK WARRIOR RIVER, ALA.

Lease of Water Power Created by Lock and Dam on Black Warrior River, Ala.—The Secretary of War has no right without express authority from Congress to enter into an agreement for the lease of the water power created by a Government lock and dam on the Black Warrior River, Ala. 154.

BONDS.

HELD BY NONRESIDENT FOREIGNERS. *See* INCOME TAX, 1, 2, 3.

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SUBSIDY. *See* CENTRAL BRANCH UNION PACIFIC RAILROAD.

VALIDITY OF ISSUES. *See* PORTO RICO, 2.

BOUNDARIES.

1. **Canadian Boundary Waters.**—Section 3109 of the Revised Statutes, in imposing certain restrictions upon masters of foreign vessels which are not imposed upon masters of domestic vessels, is in conflict with the provisions of article 1 of the convention concerning the boundary waters between the United States and Canada, concluded January 11, 1909, between the United States and Great Britain. 351.
2. **Same.**—Section 3109 of the Revised Statutes being incompatible with the provisions of the later self-executing treaty of January 11, 1909, the former must be regarded as superseded by the latter in so far as it is inconsistent therewith, and hence it is the duty of the administrative officers of the Government to fulfill the requirements of the treaty. 351.

BOUNDARIES—Continued.

3. Same.—Rio Grande Boundary.—Under a provision of the Diplomatic and Consular appropriation act of March 4, 1915 (38 Stat. 1120), the Secretary of State may direct an investigation as to any or all tributaries within the United States, whether or not flood streams, which may contribute to the flood conditions in the Rio Grande affecting the boundary line between the United States and Mexico. 369.
4. Same.—Congress has plenary power to authorize an investigation of nonnavigable streams within a State whenever, in the judgment of Congress, such action is necessary for the preservation of the navigability of its waterways, or for the maintenance with certainty and without fluctuation of the international boundary lines of the United States. 369.

See also NIAGARA RIVER, 2.

CANADIAN BOUNDARY WATERS. *See* BOUNDARIES, 1, 2; NIAGARA RIVER, 2.

CANADIAN EXPEDITIONARY FORCE.

ENLISTMENT OATH. *See* CITIZENSHIP, 3, 4.

CANAL ZONE.

1. Amendment of Penal Code and Code of Criminal Procedure by Executive Order.—By section 2 of the Panama Canal act of August 24, 1912 (37 Stat. 561), the President is prohibited from amending sections 342, 368, and 461 of the Penal Code, and repealing section 47 of the Code of Criminal Procedure of the Canal Zone. 344.
2. Same.—Section 23 of the Code of Criminal Procedure of the Canal Zone may be amended by the President by virtue of section 7 of the Panama Canal act, which authorizes him to establish by order rules governing the magistrates' courts. 344.
3. Appointment of Assistant to District Attorney of Canal Zone.—By virtue of an Executive order dated February 2, 1914, delegating to the governor of the Canal Zone certain powers of appointment, which were conferred upon the President by section 4 of the Panama Canal act of August 24, 1912 (37 Stat. 561), the governor has authority to appoint, with such official designation as he may deem proper, an assistant to the district attorney of the Canal Zone. 561.
4. Opium Importation.—The courts of the Canal Zone have jurisdiction, under the Panama Canal act of August 24, 1912 (37 Stat. 560), to impose the penalties prescribed in section 7 of the said act of January 17, 1914. 271.

CANAL ZONE—Continued.

5. Same.—Sections 5 and 6 of the act of January 17, 1914, which is amendatory of the act of February 9, 1909 (35 Stat. 614), prohibiting the importation and use of opium for other than medicinal purposes, are applicable to the Canal Zone. 271.

CAPITALIZATION. See NATIONAL BANKS, 2.**CARS, EMPTY. See ARMS AND MUNITIONS OF WAR, 2.****CATTLE.**

IMPORTATION INTO UNITED STATES. *See* COLOMBIA, 1, 2; ARMS AND MUNITIONS OF WAR, 4.

CENSORSHIP.

Radio Stations.—The President has authority to maintain a Government censorship in radio stations, and may, through the Secretary of the Navy or any other appropriate department, close down, or take charge of and operate, such plants, should he deem it necessary in securing obedience to his proclamation of neutrality of August 5, 1914. 291.

CENTRAL BRANCH UNION PACIFIC RAILROAD.

1. With respect to the status of the claim of the United States against the old Central Branch Union Pacific Railroad, now constituting a part of the Missouri Pacific System, on account of the subsidy bonds issued by the Government in aid of the construction of said road, *held*: 35.
 - (1) That the property of the company is not now subject to a first lien in favor of the Government to secure the payment of the amounts paid by the United States, since the act of July 2, 1864, expressly subordinated the lien of the United States to the lien of the first-mortgage bonds. 35.
 - (2) That the Government has no right to demand the annual payment of 5 per cent of the net earnings of the company, because the right to the 5 per cent of the net earnings was intended as a security and sinking fund for the Government's loan, and, therefore, its existence depends upon the existence of the debt. 35.
 - (3) That the Government has no right to withhold the entire compensation earned by the company for transportation services. 35.
 - (4) That the Government still has the right to retain one-half of this compensation. 35.
 - (5) That the Government still has the right of a junior mortgagee to redeem. 35.
2. Same.—The present owner of the Central Branch of the Union Pacific Railroad Co. is not bound to pay the principal or interest on the Government bonds issued to the original company in aid of the construction of its road. 318.

CENTRAL BRANCH UNION PACIFIC RAILROAD—Continued.

3. Same.—The Government has no present right to claim either the 5 per cent of the net earnings from the railroad company or to withhold the other *half* of the compensation for services rendered it. 318.

CERTIFICATION BY CIVIL SERVICE COMMISSION.

CORRECTION, AFTER APPOINTMENT. *See* CIVIL SERVICE, 1.

CHECKS.

Duplicate Checks—Indemnity Bonds.—In case of the loss of an original check issued by a United States disbursing officer, the Secretary of the Treasury has no authority, under the provisions of section 3646 of the Revised Statutes, to dispense with the giving of a bond as a condition to the issuance of a duplicate check. 66.

CHINESE ADMISSION INTO UNITED STATES. *See* CITIZENSHIP, 1, 2.

CIRCULATION OF NEWSPAPERS. *See* NEWSPAPERS, 1, 2.

CITIZENSHIP.

1. Admission of Chinese into United States.—Paragraph "F" of rule 9 of the Chinese admission regulations, which, in effect, denies citizenship to foreign-born children of American Chinese, is invalid. 529.
2. Same.—Foreign-born children of American-born Chinese fathers are entitled to enter the United States as citizens thereof, notwithstanding the fact that they continued to reside for some time in China after reaching their majorities, without any affirmative action on their part indicating an intention to remain citizens of the United States. 529.
3. Citizenship of Mrs. Berryman.—The enlistment of a citizen of the United States in the Canadian expeditionary force for the war in Europe, which required his taking a qualified oath of allegiance to Canada, does not forfeit his wife's American citizenship. 412.
4. Same.—In such case the wife, who has resided in Canada since 1912, can not be barred from returning to the United States, the country of her nativity and citizenship. 412.

CIVIL OFFICE. *See* ENGINEER CORPS; REVENUE CUTTER SERVICE.

CIVIL SERVICE.

1. Correction of Certification After Appointment.—The Civil Service Commission may, at any time prior to appointment, correct a mistake in its certification, but after an appointment has been made and has been accepted by the appointee, without any fraud on his part or concealment of material facts, and the matter involved is not jurisdictional, it is then too late for the commission to attempt to correct its certification. 169.

CIVIL SERVICE—Continued.

2. **Excepted Positions.**—Section 6 of the Post Office Department appropriation act of August 24, 1912 (37 Stat. 555), which prescribes regulations in respect to the removal of persons in the classified civil service, does not apply to those occupying excepted positions. 181.
3. **Employees in Quartermaster's Department, Philippines.**—The Civil Service Commission has no authority to cancel the classification of an employee brought within the classified civil service under the Executive order of March 1, 1904, which classified certain positions in the civil service of the War Department in the Philippines. 79.
4. **Same.**—A person in the classified civil service can not be deprived of his status in the service except by removal as provided in section 6 of the act of August 24, 1912 (37 Stat. 555), and it is for the head of a Department, and not the Civil Service Commission, to determine when there exists proper cause for the removal. 79.
5. **Nonassembled Examinations.**—The proviso of section 7 of the census act of July 2, 1909 (36 Stat. 3), which requires that all examinations for positions in the Government service shall be had in the State or Territory in which the applicant resides, does not apply to the so-called nonassembled examinations. 194.
6. **Promotions.**—Promotion from the position of messenger boy, in the classified nonapportioned service, to the position of laborer with classified duties, which is subject to the rule of apportionment, is prohibited by section 6 of Rule XI of the civil-service rules. 10.
7. **Same.**—An applicant by passing the civil-service examination does not acquire a vested right to promotion in accordance with the rules in force at the time the examination is held. 10.
8. **Same.**—Promotion of Apprentices, Standards Bureau.—The provision of the act of July 16, 1914 (38 Stat. 502), authorizing the promotion of apprentices in the Bureau of Standards, includes "laboratory," "shop," and "office" apprentices. 430.
9. **Rules Prohibiting Political Discrimination.**—The Civil Service Commission has authority, under clause 4, section 2, of the civil-service act of January 16, 1883 (22 Stat. 404), to investigate alleged violations of civil-service rules prohibiting political discrimination in the classified service. 512.

CLAIMS.

AUTHORITY TO DETERMINE. *See* WORKMEN'S COMPENSATION, 3.
OF UNITED STATES. *See* CENTRAL BRANCH UNION PACIFIC
RAILROAD.

CLERKS.

EMPLOYMENT OF TEMPORARY, ETC. *See* POSTAL SERVICE, 1.

CLEVELAND, GROVER. *See* GROVER CLEVELAND BIRTHPLACE.

CLOTHES. *See* ARMS AND MUNITIONS OF WAR, 5.

COAL AND COKE. *See* ARMS AND MUNITIONS OF WAR, 3.

COFFEE. *See* CUSTOMS LAWS, 4.

COKE. *See* ARMS AND MUNITIONS OF WAR, 3.

COLLECTORS, DEPUTY. *See* INTERNAL REVENUE, 2, 3.

COLLECTORS OF PORTS.

Tenure of Office in Enlarged Districts.—The continuance in office of collectors of ports in the enlarged districts until expiration of their existing commissions, was duly authorized by the act of August 24, 1912 (37 Stat. 434), under which the President's order of March 3, 1913, reorganizing the customs service was issued. 204-05.

COLOMBIA.

1. Importation of Cattle into United States.—Columbia is not entitled, under the treaty of 1846 between the United States and New Granada, to have healthy cattle imported from her territory into the United States until the Secretary of the Treasury has officially determined, and given public notice thereof, that such importation will not tend to the introduction or spread of contagious or infectious diseases among cattle of the United States. 325.
2. Same.—Colombia is entitled to have tick-infested cattle imported into that part of Texas below the southern cattle quarantine line upon complying with all the regulations and fulfilling all the conditions imposed upon the importation of tick-infested cattle from Mexico. 325.

COMMERCE, SECRETARY OF.

DESIGNATION OF DISBURSING CLERK. *See* LABOR, DEPARTMENT OF.

MOVEMENT AND ANCHORAGE OF VESSELS. *See* VESSELS, 4.

COMMERCIAL ATTACHÉ. *See* NAVY, 2.

COMPENSATION. *See* SOLDIERS AND SAILORS; PANAMA CANAL, 7, 8.

COMPENSATION FOR ACCIDENTS. *See* WORKMEN'S COMPENSATION.

COMPROMISE OF TAX CASE. *See* INTERNAL REVENUE, 1.

CONFISCATION. *See* WAR DEPARTMENT, 1, 2.

CONGRESS.

INVESTIGATION OF NONNAVIGABLE STREAMS. *See* BOUNDARIES, 4.

CONSTITUTIONALITY OF PROPOSED LIQUOR LAW. *See* INTOXICATING LIQUORS.

CONTRABAND. *See* ARMS AND MUNITIONS OF WAR.

CONTRACTS.

1. Bids—Withdrawal Before Acceptance.—A bidder on a Government contract can not withdraw his bid before a reasonable time is allowed the Government for acceptance after the opening of the bids. 56.
2. Same.—Where certain bids for the purchase of copper scrap located on the Isthmus of Panama were to be opened and tabulated at Washington and were then to be referred to the Isthmus for final decision: *Held*, That a delay of seven days before notice of acceptance was not unreasonable as a matter of law. 56.
3. Government Supplies.—It was within the power of the Joint Committee on Printing to make a contract for supplying the Government with so much paper as may be required for the public printing and binding for the period of six months from March 1, 1916, and such contract obligated the contractor to furnish such paper to the limit of the Government's needs during the life of the contract. 541.
4. Same.—The Government has no right to enter into a new contract for any part of the supply covered by the old contract, save as provided in the old contract itself. 541.
5. Same.—The Government can not be compelled to take more than it needs, though that need is less than the amount specified in the schedule or estimates. 541.
6. Memorial Amphitheater, Arlington National Cemetery, Va.—Section 4 of the act of March 4, 1913, which created a commission to direct the construction of a memorial amphitheater at Arlington National Cemetery, Va., does not authorize any present expenditure, but it does authorize the commission to enter into contract or contracts to the extent of the full cost of the building, to wit, \$750,000. 147.
7. Military Movement of Troops.—The Navy Department can not enter into a contract for the military movement of troops without previously advertising for proposals as required by section 3709 of the Revised Statutes. 381.
8. Same.—The act to regulate commerce of February 4, 1887 (24 Stat. 379), does not forbid a contract for the military movement of troops at less than tariff rates. 381.

CONTRACTS—Continued.

9. *Same.*—Neither sections 1 or 2 of the Sherman antitrust act of July 2, 1890 (26 Stat. 209), nor section 5 of the act to regulate commerce of February 4, 1887 (24 Stat. 380), prevents the Navy Department from agreeing with many railroads, or prevents such railroads from agreeing among themselves, that a common agent of the roads may for a definite period direct the routing of Federal troops. 381.
10. *Same.*—Whether the proposed agreement would be contrary to public policy as judicially construed and whether such agreement, if entered into, could be enforced by the courts, are questions which can not be answered because they are too general, and the second question can not be answered for the further reason that it involves a speculation as to future judicial action. 381.
11. *Same.*—It is not believed that the proposed contract, if made, would embarrass the Department of Justice in the prosecution of railroads for pooling contracts. 381.
12. *Pacific Gas & Electric Co.—Validity of Contract.*—The contract entered into between the United States and the Pacific Gas & Electric Co., in connection with the construction, operation, and maintenance of the Salt River reclamation project, neither violates the provisions of the antitrust law of July 2, 1890 (26 Stat. 209), nor the provision of the act of April 16, 1906 (34 Stat. 116), which, in authorizing the Secretary of the Interior to lease surplus power derived from reclamation projects, provides that preference shall be given to municipal uses. 197.
13. *Same.*—By the terms of this contract the Pacific Gas & Electric Co. surrendered and conveyed all of its rights within the physical limits of the Salt River reclamation project, and in lieu thereof the United States agreed to furnish to the company in the city of Phoenix, Ariz., a specified amount of electrical energy generated at its works at the Roosevelt Reservoir at a stipulated sum of money and for a term not exceeding 10 years, and the United States further agreed that while serving power to the company under the terms of the contract it would refrain from entering into a general retailing of power to customers in the city of Phoenix, and from furnishing power to any one in said city to be again sold or retailed. 197.
14. *Star-Route Service.*—As the Postmaster General is expressly authorized by law to enter into contracts for carrying the mail for a term not exceeding four years without regard to the appropriations therefor, and as the Post Office appropriation act of March 4, 1913 (37 Stat. 791), does not undertake to limit that authority, he may contract for star-

CONTRACTS—Continued.

route service for the current fiscal year in excess of the appropriation therefor contained in that particular act. 186.

15. **Waiver of Performance—Increased Price of Supplies.**—The Secretary of the Treasury has no authority to relieve a contractor from the performance of his contract to furnish supplies to the Government because of the increased price thereof incident to the European War. 301.

EIGHT-HOUR STIPULATION. *See* EIGHT-HOUR LAW.

GUARANTY OF DEPOSITS. *See* NATIONAL BANKS, 1.

LETTERS OF PROPOSAL AND ACCEPTANCE. *See* EIGHT-HOUR LAW, 14.

LINCOLN MEMORIAL. *See* LINCOLN MEMORIAL, 1.

PUBLIC BUILDINGS. *See* EIGHT-HOUR LAW, 3, 9, 10, 11, 12, 13, 14, 15, 16, 17.

PURCHASE OF LOCOMOTIVE. *See* EIGHT-HOUR LAW, 1.

PURCHASE OF PRINTING AND BINDING SUPPLIES. *See* EIGHT-HOUR LAW, 7; PUBLIC PRINTER, 3, 4.

REIMBURSING SUBCONTRACTOR FOR EARTHQUAKE LOSSES. *See* EARTHQUAKE LOSSES, 1, 2.

COPPER SCRAP, PANAMA. *See* CONTRACTS, 2.

COPYRIGHT LAW.

1. **Lithographic Prints.**—In the issuance of copyrights for lithographic prints, the Register of Copyrights is vested with some discretionary powers of investigation, and may require a satisfactory showing of compliance with the plain conditions prescribed by the copyright law. 422.
2. **Same.**—Whether certain lithographic prints produced in Germany are "works of art" within the meaning of section 15 of the copyright act of March 4, 1909 (35 Stat. 1078), is a question of fact which should be determined by the Copyright Office, rather than by the Attorney General. 422.

CORPORATIONS.

DOMESTIC. *See* INCOME TAX, 4.

FOREIGN, RIGHT TO WATER POWER PERMIT. *See* NATIONAL FORESTS, 1.

STOCK OWNED BY NONRESIDENT ALIENS. *See* INCOME TAX, 1, 4.

CREDIT, EMERGENCY. *See* POSTAL SAVINGS SYSTEM, 1.

CRESCENT MINING CO.

WATER POWER PERMITS. *See* NATIONAL FORESTS, 1.

CREW SPACE ON VESSELS. *See* VESSELS, 5, 6.

CUBA.

SUGAR IMPORTED INTO UNITED STATES. *See* CUSTOMS LAWS, 5.

CUSTOMS LAWS.

1. **Drawback on Articles Shipped to Guam and Tutuila.**—The Secretary of the Treasury may not authorize a drawback on articles shipped from this country to Gaum and Tutuilla under section 25 of the tariff act of August 5, 1909 (36 Stat. 90). 231.
2. **Same.—Entry of Wood Pulp.**—Wood pulp shipped to the United States from Norway on through bills of lading but transhipped en route at Rotterdam is entitled to free entry by virtue of the favored-nation clause in the subsisting treaty between the United States and Norway, provided such wood pulp is the product of Norway and otherwise conforms to the conditions prescribed by section 2 of the so-called Canadian reciprocity act of July 26, 1911 (37 Stat. 11). 224.
3. **Same.**—Such transshipment merely for transportation purposes does not prevent the goods from being "imported directly" from Norway "into the United States" within the meaning of the act. 224.
4. **Importation of Coffee into Porto Rico.**—So much of the provisions of sections 2 and 3 of the act of April 12, 1900 (31 Stat. 77), as refers to the importation of coffee into Porto Rico was repealed by the tariff act of August 5, 1909 (36 Stat. 71), and is no longer in force, but the provisions of the tariff act of October 3, 1913 (38 Stat. 152), including coffee upon the free list, are applicable to its importation into Porto Rico. 275.
5. **Preferential on Cuban Sugar.**—Under the rates of duty imposed by paragraph 177 of the tariff act of October 3, 1913, and effective March 1, 1914 (38 Stat. 131), the 20 per cent preferential on Cuban sugar imported into the United States continues on and after the latter date. 259.
6. **Reliquidation of Entries.**—The Secretary of the Treasury has authority under section 25 of the tariff act of August 27, 1894 (28 Stat. 552), to direct reliquidation of certain entries covering imported merchandise, upon the basis of the rate of exchange in this country for the foreign currency specified in the invoice when the value of such currency at the prevailing rate is at least 10 per cent less than the proclaimed value. 450.

CUSTOMS SERVICE.

COLLECTORS. *See* COLLECTORS OF PORTS; INTERNAL REVENUE, 2, 3.

DAVIS, JEFFERSON.

SURRENDER OF HIS PERSONAL EFFECTS. *See* WAR DEPARTMENT, 1, 2.

DENTAL RESERVE CORPS.

NAVY. *See* NAVY, 1.

DENTAL SURGEON.

ACTING ASSISTANT, NAVY. *See* NAVY, 1.

DEPOSITORIES FOR POSTAL SAVINGS. *See* FEDERAL RESERVE BANKS, 3, 4.**DEPOSITS, GUARANTY OF.** *See* NATIONAL BANKS, 1.**DEPUTY COLLECTORS.**

TENURE OF OFFICE. *See* INTERNAL REVENUE, 2, 3.

DISBURSING CLERK.

DEPARTMENT OF LABOR. *See* LABOR, DEPARTMENT OF.

DISTRICT OF COLUMBIA.

Recorder of Deeds Office—Transfer to Control of Attorney General.—It would require the sanction of Congress to place the office of recorder of deeds of the District of Columbia under the administrative control and supervision of the Attorney General. 119.

DRAWBACK. *See* CUSTOMS LAWS, 1.**EARTHQUAKE LOSSES.**

1. Customhouse at San Francisco—Payment for Earthquake Losses by Contractor.—The provision of the act of May 27, 1908 (35 Stat. 318), which authorizes the Secretary of the Treasury to reimburse the contractor for the loss sustained by him in consequence of the earthquake and fire of 1906 in constructing the customhouse at San Francisco, does not warrant any payment to his subcontractors for their individual losses due to these causes. 46.
2. Same.—If, however, the contractor should, in pursuance of his verbal understanding with the subcontractors, pay them an amount properly attributable to said earthquake and fire, he would be entitled to be reimbursed for that amount of the appropriation in question. 46.

EDUCATION, COMMISSIONER OF.

COPY FOR ANNUAL REPORT. *See* PUBLIC PRINTER, 1.

EIGHT-HOUR LAW.

1. Contracts for the purchase of locomotives made according to standard designs and assembled as ordered, of parts kept in stock, are excepted from the operation of the eight-hour law of June 19, 1912 (37 Stat. 137). 49.
2. Manufacture of Ammunition.—The provision contained in the fortification act of June 6, 1912 (37 Stat. 127), relative to the eight-hour law applies only to employees, laborers, and mechanics *while* engaged in the work of manufacturing the ammunition named therein, and does not establish any general rule governing the employees of the contractor beyond

EIGHT-HOUR LAW—Continued.

- their occupation in carrying out the work embraced in the contract with the Government. 16.
3. **Marble and Stone for Public Buildings.**—The provisions of the eight-hour law of June 19, 1912 (37 Stat. 137), do not apply to the labor involved in the dressing of marble and stone for public buildings, such labor not being performed at the sites of the buildings themselves, since marble and stone clearly belong in their nature to articles or materials ordinarily to be bought in the open market, although they may be dressed and finished in a manner peculiar to the needs of a particular building. 211.
 4. **Marble for Lincoln Memorial.**—A subcontractor furnishing cut and finished marble for the Lincoln Memorial should be excepted from the operation of the eight-hour law of June 19, 1912 (37 Stat. 137), if it be found that such marble is a material or article which is usually manufactured in standard forms for the general market and which producers or dealers usually offer for sale in the course of their business. 364.
 5. **Panama Canal.**—The act of March 3, 1913, regulating the hours of service of laborers and mechanics employed on Government work and persons employed in constructing, maintaining, and improving the rivers and harbors of the United States, does not apply to persons performing services similar to those of laborers and mechanics employed in connection with dredging work on the Panama Canal. 139.
 6. **Same.—Alien Laborers.**—The above-mentioned act has not repealed or modified the provisions in the acts of February 27, 1906, and June 30, 1906 (34 Stat. 33, 669), relating to alien laborers and to the foremen and superintendents of such laborers. 139.
 7. **Printing and Binding Production.**—Contracts for the purchase of the articles used in printing and binding production herein enumerated are excepted from the operation of the eight-hour law of June 19, 1912 (37 Stat. 137), being such articles as are usually bought in open market and in some instances being also classed as supplies for the Government. 24.
 8. **Appropriations—Public Building Contracts.**—Contracts for public buildings for which appropriation was made in full prior to June 19, 1912, are not required to contain the eight-hour workday stipulation prescribed by section 1 of the act of June 19, 1912 (37 Stat. 137). 137.
 9. **Same.**—The eight-hour law of June 19, 1912 (37 Stat. 137), has not repealed or modified the eight-hour law of August 1,

EIGHT-HOUR LAW—Continued.

- 1892 (27 Stat. 840), and hence the latter still applies to work done on public buildings, no matter when the appropriation therefor may have been made. 137.
10. *Same.*—So also where the limit of cost of a public building has been fixed by law and the authority has been given to enter into contracts up to the full limit prior to June 19, 1912, but the appropriation therefor has been only partly made prior to that time, the contracts for that portion of the work appropriated for subsequent thereto are not required to contain said eight-hour stipulation. 137.
 11. *Public Building Contracts—Employment of Labor.*—The eight-hour workday restriction of the act of June 19, 1912 (37 Stat. 137), known as the eight-hour law, applies to the employment of labor on the work contemplated by the contract, and it is immaterial by whom the labor is employed, whether by a contractor, subcontractor, or sub-subcontractor. 31.
 12. *Same.*—Contracts excepted from the operation of the eight-hour law need not contain the eight-hour stipulation. 31.
 13. *Same.*—When contracts are made by letters of proposal and acceptance, the latter should contain the eight-hour stipulation. 31.
 14. *Same.*—Contracts for the purchase of the materials and articles entering into the construction of public buildings herein enumerated are excepted from the provisions of the eight-hour law. Opinion of January 21, 1913 (30 Op. 24), followed. 31.
 15. *Same.*—In the construction of public buildings, where the Government contracts for the furnishing of the materials and labor as well as for the erection of the building but the purchases of the materials are made directly by the contractor or subcontractor, the purchases of such materials by the contractor or subcontractor are subject to the exceptions in section 2 of the eight-hour law of June 19, 1912 (37 Stat. 137). 133.
 16. *Same.*—Where Congress has fixed the limit of cost of a public building and made a partial appropriation therefor prior to June 19, 1912, but subsequent thereto has increased the limit of cost, the contract for the erection of said building, whether entered into before or after the time when said limit of cost is so increased, is excepted from the operation of section 1 of the eight-hour law of June 19, 1912 (37 Stat. 137). 150.
 17. *Public Highway in Minnesota.*—The Federal statutes regulating the hours of labor do not apply to the improvement of selected roads over which rural delivery is or may be estab-

EIGHT-HOUR LAW—Continued.

lished as provided for under the provisions of the Post Office appropriations act of August 24, 1912 (37 Stat. 551). 210.

ELECTRICAL POWER.

DEVELOPMENT AND TRANSMISSION. *See* CONTRACTS, 12, 13; Rights of Way, 15.

IMPORTATION FROM CANADA. *See* NIAGARA RIVER, 3.

EMPLOYEES. *See* PHILIPPINE ISLANDS, 1, 2, 3.

EMPTY CARS. *See* ARMS AND MUNITIONS OF WAR, 2.

ENGINEER CORPS.

Officers—Authority to Grant Leave of Absence to Officer of the Engineer Corps to Accept Civil Office.—The Secretary of War is prohibited by section 1224 of the Revised Statutes from granting leave of absence to an officer of the Engineer Corps in order that he may be employed by the Interstate Commerce Commission to assist in the valuation of properties of common carriers under the act of March 1, 1913 (37 Stat. 701). 184.

ENLISTMENT OATH.

CANADA. *See* CITIZENSHIP, 3, 4.

EXAMINATIONS, NONASSEMBLED. *See* CIVIL SERVICE, 5.

EXCHANGE RATES.

FOREIGN CURRENCY. *See* CUSTOM LAWS, 6.

EXECUTIVE DEPARTMENTS.

COPY OF ANNUAL REPORTS FOR PUBLIC PRINTER. *See* PUBLIC PRINTER, 1, 2.

PARCEL POST. *See* PARCEL POST.

EXEMPTIONS. *See* FOOD AND DRUGS ACT.

FEDERAL RESERVE ACT. *See* FEDERAL RESERVE BANKS, 1, 3.

FEDERAL RESERVE ACT. *See* FEDERAL RESERVE BOARD, 1, 3.

FEDERAL RESERVE BANKS.

1. Capitalization.—The Federal reserve act, in prescribing a minimum capitalization of \$4,000,000 for Federal reserve banks as a condition precedent to commencing business, does not require that such minimum capitalization shall be preserved when member banks reduce their capital stock or surplus or cease to be members. 517.
2. Change of Location.—The Federal Reserve Board can not legally change the present location of any Federal reserve bank, whether there has been an alteration or readjustment in the district lines or not. 517.

FEDERAL RESERVE BANKS—Continued.

3. **Deposits of Public Funds.**—That portion of section 15 of the Federal reserve act of December 23, 1913 (38 Stat. 265), reading: "No public funds of the * * * postal savings * * * shall be deposited, in the continental United States, in any bank not belonging to the system established by this act," does not take effect until after a reserve bank has been authorized by the comptroller to "commence business" in the district and the Secretary "shall have officially announced" its establishment. 304.
4. **Same.**—Funds of the postal savings on deposit elsewhere at the time that the above clause becomes operative, need not be then transferred to, and redeposited in, a member or reserve bank. 304.
5. **Same.**—Postal and Money-Order Funds.—All postal receipts, including fees only from the money-order business, are "revenues of the Government" within the meaning of section 15 of the Federal reserve act of December 23, 1913 (38 Stat. 265), and may be deposited in Federal reserve banks or in their member banks. 553.
6. **Power to Abolish Federal Reserve Districts or Banks.**—The Federal Reserve Board does not possess the power to abolish any of the existing Federal reserve districts or Federal reserve banks. 497.
7. **Stamp Tax.**—Certificates of stock to be issued to member banks by Federal reserve banks should not be revenue stamped under Schedule A of the act of October 22, 1914 (38 Stat. 759). 511.

FEDERAL RESERVE BOARD.

1. **Federal Reserve Notes—Penalty Envelopes.**—The Federal reserve act of December 23, 1913 (28 Stat. 267), prohibits sending Federal reserve notes through the mails under penalty envelopes or labels by the members of the Federal Reserve Board. 456.
2. **Federal Reserve Board.**—Moneys received by the Federal Reserve Board, under section 10 of the Federal reserve act of December 23, 1913 (38 Stat. 261), are "public moneys" within the meaning of the auditing statutes, and consequently are subject to audit by one of the auditors of the Treasury Department. 308.
3. **Powers.**—It was the purpose of the Federal reserve act to insure the preservation and supremacy of all existing powers of the Secretary of the Treasury in all cases where it might be claimed that such powers overlapped or conflicted with those of the Federal Reserve Board, but that act clearly recognized the existence of powers of the board independent of the Secretary in cases where no such conflict existed. 308.

FEDERAL RESERVE BOARD—Continued.

4. Same.—The Federal Reserve Board can not legally change the present location of any Federal reserve bank, whether there has been an alteration or readjustment in the district lines or not. 517.
5. Same.—The Federal Reserve Board does not possess the power to abolish any of the existing Federal reserve districts or Federal reserve banks. 497.

FEDERAL RESERVE DISTRICTS. *See* **FEDERAL RESERVE BANKS**, 6.

FEDERAL RESERVE NOTES. *See* **FEDERAL RESERVE BOARD**, 1.

FEES.

MONEY-ORDER BUSINESS. *See* **FEDERAL RESERVE BANKS**, 5.

FOOD AND DRUGS ACT.

1. Administrative Rules.—Under the food and drugs act of June 30, 1906 (34 Stat. 768), as amended by the act of March 3, 1918 (37 Stat. 732), administrative rules are to be promulgated specifically defining (1) reasonable variations, (2) tolerances as to large packages, (3) exemptions as to small, the line between large and small packages to be determined by the three secretaries. 222.
2. Application to Meats and Meat Products.—Meats and meat-food products prepared for interstate and foreign commerce under the meat-inspection law of June 30, 1906 (34 Stat. 674), are subject to the provisions of the food and drugs act of June 30, 1906 (34 Stat. 768). 164.

APPLICATION TO MEATS AND MEAT-FOOD PRODUCTS. *See* **MEAT INSPECTION**.

FOODSTUFFS. *See* **ARMS AND MUNITIONS OF WAR**, 6.

FOREIGN CORPORATIONS.

RIGHT TO WATER POWER PERMIT. *See* **NATIONAL FORESTS**, 1.

FOREIGN VESSELS.

SUBJECT TO SECTION 14, SEAMEN'S ACT. *See* **VESSELS**, 7, 8, 9, 10.

FOREIGNERS.

NONRESIDENT, INCOME TAX. *See* **INCOME TAX**, 1, 2, 3, 4.

FOREMAN.

OF ALIEN LABORERS. *See* **EIGHT-HOUR LAW**, 6.

FORESTS RESERVES. *See* **NATIONAL FORESTS; RIGHTS OF WAY**, 3.

FORT SABINE MILITARY RESERVATION. *See* **PUBLIC LANDS**, 1, 2, 3, 4.

FRANKING PRIVILEGE.

FEDERAL RESERVE NOTES. *See* **FEDERAL RESERVE BOARD**, 1.

GETTYSBURG NATIONAL PARK.

Arrests.—Employees of the Gettysburg National Park are authorized, under the act of February 6, 1905 (33 Stat. 700), to make arrests for the violation of the laws and regulations relating to said park. 465.

GIFTS TO UNITED STATES. *See* GROVER CLEVELAND BIRTHPLACE.

GIRTHS. *See* ARMS AND MUNITIONS OF WAR, 5, 6.

GOVERNMENT CONTRACTS. *See* CONTRACTS.

GOVERNMENT HOSPITAL FOR THE INSANE.

1. **Commitment of Insane Federal Prisoner.**—On December 3, 1914, Ernest Angelini was sentenced to 18 months' imprisonment for a fraudulent use of the mails, and by reason of good-time reduction was entitled to be discharged from imprisonment on February 15, 1916; therefore the order of the Secretary of the Interior of February 21, 1916, directing his transfer from the United States penitentiary at Leavenworth, Kans., to the Government Hospital for the Insane, at Washington, D. C., is not sufficient authority for his detention in the latter institution. 569.

2. **Same.**—Upon the expiration of Angelini's term of imprisonment (Feb. 15, 1916), he became entitled to be fully discharged from Federal control and custody, but thereafter he was subject to the insanity laws and processes of the State, Territory, or district wherein he might be found and accused of insanity. 569.

3. **Same.**—The Attorney General declines to express an opinion upon the question propounded by the Secretary of the Interior as to the legality of commitment or detention of alleged insane persons under certain other designated acts of Congress, and as to whether those acts comply with the constitutional requirements as to due process of law, for the reason that no concrete case involving those statutes appears to be pending or requiring administrative action in his department. 569.

GOVERNMENT-OWNED SITE. *See* AQUEDUCT BRIDGE, VA., 1, 2, 3.

GOVERNMENT SUPPLIES. *See* CONTRACTS, 3, 4, 5.

GOVERNMENT WORK.

LABORERS, MECHANICS, ETC. *See* EIGHT-HOUR LAW, 5, 6.

GREAT FALLS & OLD DOMINION RAILROAD CO.

RELOCATION OF TRACK. *See* AQUEDUCT BRIDGE, VA.

GROVER CLEVELAND BIRTHPLACE.

The proposed gift of the Grover Cleveland birthplace at Caldwell, N. J., upon the condition that the property be maintained as a suitable memorial, should not, as a matter of administrative policy, be accepted on behalf of the United States without the consent of Congress and the President. 527.

GUAM. *See* CUSTOMS LAWS, 1.

HAY, ETC. *See* ARMS AND MUNITIONS OF WAR, 6.

HORSES. *See* ARMS AND MUNITIONS OF WAR, 6.

HOURS OF LABOR. *See* EIGHT-HOUR LAW.

INCOME TAX.

1. **Income Tax—Nonresident Aliens.**—Nonresident aliens—corporate or individual—not carrying on any business, trade, or profession in the United States are not subject to tax under the tariff act of October 3, 1913 (38 Stat. 166), on income derived from (a) stocks or bonds of domestic corporations doing a domestic business, or (b) from obligations secured by mortgages on tangible property within the United States, whether such obligations be held by the owners or by their collecting agents here. 435.
2. **Same.**—Opinions of October 23, 1913 (30 Op. 230), July 15, 1914 (30 Op. 273), and February 19, 1915, adhered to. 435.
3. **Same.—Bonds.**—Section 2, paragraph A, subdivision 1, of the tariff act of October 3, 1913, does not lay a tax upon the interest accruing on bonds executed by a resident or citizen of the United States when held and owned by a nonresident foreigner, and this is true irrespective of whether they are unsecured or secured by a mortgage upon real estate in this country, and also irrespective of where the written bonds are in fact kept or interest payments thereon are made. 230.
4. **Same.—Shares of stock of domestic corporations owned by nonresident aliens** are not "property * * * in the United States," within the meaning of the act of October 3, 1913 (38 Stat. 166), and dividends accruing therefrom to such nonresident aliens are not subject to any tax under said act. 273.
5. **Special assessment districts, when lawfully created** under the authority of the States for the purpose of the improvement of streets and public highways, the provision of sewerage, gas and light, and the reclamation, drainage, or irrigation of considerable bodies of land within the States, are "political subdivisions" thereof within the meaning of the proviso to paragraph B, section 2, of the income-tax provision in the revenue act of October 3, 1913. 252.

INDEMNITY BONDS. *See* CHECKS.

INDEMNITY SCHOOL LANDS. *See* PUBLIC LANDS, 5, 6.

INDIAN LAND TITLES. *See* TENNESSEE, 1, 2.

INDIAN SCHOOL. *See* ARMY, 1.

INSANE FEDERAL PRISONER.

COMMITMENT. *See* GOVERNMENT HOSPITAL FOR THE INSANE, 1, 2, 3.

INTERIOR, DEPARTMENT OF.

JURISDICTION OVER EXCEPTED MINERAL LAND. *See* PUBLIC LANDS, 2, 6.

AUTHORITY TO APPROVE LAND GRANTS. *See* PUBLIC LANDS, 2.

AUTHORITY TO ENFORCE WORKMEN'S COMPENSATION, ALASKAN RAILROAD. *See* WORKMEN'S COMPENSATION, 2.

AUTHORITY TO GRANT RIGHTS OF WAY. *See* RIGHTS OF WAY, 2.

AUTHORITY TO TURN OVER COMPLETED RECLAMATION PROJECTS. *See* RECLAMATION PROJECTS.

COMMITMENT OF INSANE FEDERAL PRISONER. *See* GOVERNMENT HOSPITAL FOR THE INSANE, 1, 3.

INTERNAL REVENUE.

1. **Compromise of Tax Case Before Distraint.**—The Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, has authority under section 3229, Revised Statutes, to compromise a case involving a tax liability before proceeding to distraint and sale. 329.

2. **Deputy Collectors—Tenure of Office.**—The term of office of deputy collectors of internal revenue expires automatically upon the appointment of a successor to their own collector, and this limitation of tenure is not affected by section 6 of the act of August 24, 1912 (37 Stat. 555). 1.

3. **Same.**—In order to continue in office after the appointment of a successor to their own collector, deputy collectors must be affirmatively reappointed and recommissioned. 1.

STAMP TAX. *See* FEDERAL RESERVE BANKS, 7.

INTERNATIONAL BOUNDARIES. *See* BOUNDARIES; NIAGARA RIVER, 2.

INTOXICATING LIQUORS.

Constitutionality of Proposed Legislation Divesting Intoxicating Liquors of Their Interstate Character in Certain Cases.—The bill entitled "An act divesting intoxicating liquors of their interstate character in certain cases" (37 Stat. 609) is repugnant to the Constitution of the United States, since it delegates to the States the power to regulate interstate commerce. 88.

JACKSON LAKE DAM.

TIMBER FOR RAISING. *See* NATIONAL FORESTS, 2.

JURISDICTION OF COURTS, CANAL ZONE. *See* CANAL ZONE, 4, 5.

JUSTICE, DEPARTMENT OF. *See* CONTRACTS, 11.

LABOR.

EMPLOYMENT. *See* EIGHT-HOUR LAW, 11, 15.

LABOR, DEPARTMENT OF.

Designation of Disbursing Clerk.—The Secretary of Labor may, with the concurrence of the Secretary of Commerce, if the public exigencies require it, designate the disbursing clerk of the Department of Commerce to disburse the moneys appropriated for the various bureaus and services of the Department of Labor until a regular disbursing clerk can be appointed, provided he is able and willing to give bond as required by section 3614 of the Revised Statutes. 129.

LABOR, SECRETARY OF.

AUTHORITY TO DETERMINE CLAIMS. *See* WORKMEN'S COMPENSATION, 3.

See also LABOR, DEPARTMENT OF.

LABORER.

PROMOTION OF MESSENGER BOY. *See* CIVIL SERVICE, 6, 7.

LABORERS, MECHANICS, ETC.

ON GOVERNMENT WORK. *See* EIGHT-HOUR LAW, 6, 7.

LADING AND UNLADING OF VESSELS. *See* VESSELS, 3.

LAND DEPARTMENT, GENERAL. *See* PUBLIC LANDS, 1, 5.

LAND GRANTS. *See* PUBLIC LANDS, 2, 3, 4.

LAND TITLES. *See* TENNESSEE.

LEASE OF WATER POWER. *See* BLACK WARRIOR RIVER, ALA.

LEAVES OF ABSENCE. *See* ENGINEER CORPS.

LETTER CARRIERS. *See* POSTAL SERVICE, 1.

LICENSES. *See* AQUEDUCT BRIDGE, VA., 2; RIGHTS OF WAY, 3, 5; NATIONAL FORESTS, 1.

LIFEBOAT PROVISIONS OF SEAMEN'S ACT, SECTION 14. *See* VESSELS, 7, 8, 9, 10.

LIMITATION OF ACTIONS.

SUITS TO ANNUL PATENTS. *See* PUBLIC LANDS, 1, 4, 6.

LINCOLN MEMORIAL.

1. **Duty of Secretary of War with Respect to Lincoln Memorial.**—Under the act of February 9, 1911 (36 Stat. 898), creating the Lincoln Memorial Commission, the Secretary of War must proceed upon the view that it is his duty to enter into such contracts only as, in his opinion, are proper and necessary to carry into fruition the plan and design of the memorial approved by Congress. 239.
2. **Same.**—If for any reason the course suggested proves to be impracticable, the matter should be brought to the attention of Congress, with a request for a remedy. 239.
3. **A subcontractor furnishing out and finished marble for the Lincoln Memorial** should be excepted from the operation of the eight-hour law of June 19, 1912 (37 Stat. 137), if it be found that such marble is a material or article which is usually manufactured in standard forms for the general market and which producers or dealers usually offer for sale in the course of their business. 364.

LIQUOR LAWS. *See* INTOXICATING LIQUORS.

LITHOGRAPHIC PRINTS. *See* COPYRIGHT LAW, 1, 2.

LOCKS AND DAMS. *See* BLACK WARRIOR RIVER, ALA.

LOCOMOTIVES.

CONTRACT FOR PURCHASE. *See* EIGHT-HOUR LAW, 1.

LOUISIANA SWAMP LANDS. *See* PUBLIC LANDS, 2, 3, 4.

MAIL MATTER. *See* POSTAL SERVICE.

MARBLE.

CUT AND FINISHED, FOR LINCOLN MEMORIAL. *See* EIGHT-HOUR LAW, 4.

DRESSED, FOR PUBLIC BUILDINGS. *See* EIGHT-HOUR LAW, 3.

MARINE CORPS.

Detail of Staff Officers to Duty Outside of Washington.—Article 4141 of the Navy Regulations, approved May 14, 1913, in that it permits officers of the staff departments of the Marine Corps to be detached permanently from the headquarters of the command and gives the power to the commandant of the corps to impose duties upon these staff officers inconsistent with their staff functions, is in contravention of existing statutes, and is, therefore, invalid. 234.

MEAT INSPECTION.

Application of the Food and Drugs Act to Meats and Meat-Food Products.—Meats and meat-food products prepared for interstate or foreign commerce under the meat-inspection law of June 30, 1906 (34 Stat. 674), are subject to the provisions of the food and drugs act of June 30, 1906 (34 Stat. 768). 164.

MEMORIAL AMPHITHEATER. *See* ARLINGTON NATIONAL CEMETERY, VA., 1, 2.

MERCHANDISE.

TRANSPORTATION. *See* VESSELS, 11.

MESSENGER BOY.

PROMOTION TO LABORER. *See* CIVIL SERVICE, 6, 7.

MEXICO.

EXPORT OF MUNITIONS OF WAR TO. *See* ARMS AND MUNITIONS OF WAR, 1, 2, 3, 4, 5, 6, 7.

MIDSHIPMAN.

REVOCATION OF DISMISSAL ORDER. *See* NAVAL ACADEMY.

MILITARY RESERVATIONS. *See* PUBLIC LANDS, 1, 2, 3, 4.

MINNESOTA.

PUBLIC HIGHWAY. *See* EIGHT-HOUR LAW, 8.

MISBRANDING OF FOOD PRODUCTS. *See* FOOD AND DRUGS ACT.

MONEY-ORDER FEES. *See* FEDERAL RESERVE BANKS, 5.

MUNITIONS OF WAR. *See* ARMS AND MUNITIONS OF WAR.

NATIONAL BANKS.

1. **National Banks—Guaranty of Deposits.**—A national bank may enter into a contract with a guaranty company under which, in consideration of premiums paid by the bank, the company insures and guarantees each depositor in bank the full payment of his deposit therein. 341.
2. **Meaning of Word "Place."**—The word "place," as used in section 5138 of the Revised Statutes, relating to the capitalization of national banks, means a corporate or quasicorporate body organized for the purpose of local government in a defined territory. 173.

NATIONAL FORESTS.

1. **Foreign Corporations.**—The Crescent Mining Co., a corporation organized and existing under the laws of Canada, is not entitled to a water power permit within the Okanogan National Forest in the State of Washington. 581.
2. **Jackson Lake Dam—Timber From National Forest.**—Under the act of February 21, 1911, authorizing the Reclamation Service to cooperate with private parties in carrying out projects under the Carey Act, the Kuhn Irrigation & Canal Co. may be permitted to take timber from the Teton National Forest free of charge for use in raising the dam at Jackson Lake, Wyo., which is a project authorized under the reclamation act of June 17, 1902. 398.
3. **Same.**—The Reclamation Service is not entitled to the receipts from sales of timber from lands withdrawn from public entry that the Forest Service may make to private parties for general commercial purposes. 398.

NATIONAL FORESTS—Continued.

TRANSMISSION OF ELECTRICAL POWER. *See* RIGHTS OF WAY, 1, 2, 4.

NATIONAL PARKS. *See* GETTYSBURG NATIONAL PARK.

NEUTRALITY. *See* ATTORNEY GENERAL, 3; CENSORSHIP.

NAVAL ACADEMY.

Revocation of Order of Dismissal of Midshipman.—The President is unauthorized to reopen the case of a midshipman who has been dismissed from the Naval Academy with a view to revoking the order of dismissal and reinstating him. 457.

NAVAL OFFICERS. *See* NAVY, 2, 6.

NAVY.

1. **Appointments—Acting Assistant Dental Surgeon.**—The act of March 4, 1913 (37 Stat. 903), creating a Navy Dental Reserve Corps, did not repeal the provision of the act of August 22, 1912 (37 Stat. 344), authorizing appointments to the grade of acting assistant dental surgeon in the Navy from among dental graduates in civil life. 279.
2. **Same.**—A retired naval officer whose compensation as such amounts to \$2,500 per annum is ineligible to appointment, as a commercial attaché under the provisions of the act of July 16, 1914 (38 Stat. 500), making appropriations for the legislative, executive, and judicial expenses of the Government. 298.
3. **Regulations—Detail of Staff Officers, Marine Corps.**—Article 4141 of the Navy Regulations, approved May 14, 1913, in that it permits officers of the staff departments of the Marine Corps to be detached permanently from the headquarters of the command and gives the power to the commandant of the corps to impose duties upon these staff officers inconsistent with their staff functions, is in contravention of existing statutes and is, therefore, invalid. 234.
4. **Same.—Pay Officers.**—The decisions of the Comptroller of the Treasury declaring invalid article R-3991 of the Navy Regulations of 1913, relating to the duties of pay officers of shore stations, are not conclusive upon the Navy Department. 376.
5. **Same.**—This regulation is valid at least to the extent of protecting a pay officer in good faith paying items that on the face of the roll are apparently legal expenditures. 376.
6. **Retirement of Army and Navy Officers Serving on the Isthmus of Panama.**—Under the act of March 4, 1915 (38 Stat. 1190), providing for recognizing the services of certain officers of the Army, Navy, and Public Health Service for their services in connection with the construction of the Panama

NAVY—Continued.

Canal, when an officer otherwise within the purview of the act applies for retirement he *must* be retired, and the President has no discretionary authority to postpone the date of retirement to such time as he may deem proper. 406.

NAVY DEPARTMENT.

MOVEMENT OF TROOPS. *See* CONTRACTS, 7.

REASSIGNMENT OF QUARTERS. *See* STATE, WAR, AND NAVY BUILDINGS.

REGULATIONS. *See* NAVY, 3, 4, 5.

NEW ECHOTA TREATY.

INDIAN LAND TITLES. *See* TENNESSEE, 1, 2.

NEWSPAPERS, ETC.

1. Statement of Paid Circulation.—The statement of daily newspapers required to be filed by section 2 of the Post Office appropriation act of August 24, 1912 (37 Stat. 553), should cover the whole *bona fide* paid circulation, however attained, whether sold over the counter, distributed through news agencies and news routes, or disposed of in any other way. 244.
2. Same.—Opinion of September 25, 1912 (29 Op. 526), in so far as it gives a restricted meaning to the words "sold or distributed to paid subscribers," modified. 244.

NIAGARA RIVER.

1. Diversion of Water.—Any diversion of water from the Niagara River on the American side in such quantity as substantially to interfere with the navigable capacity of that river or the connected Lakes, or which in any substantial degree alters or modifies the course, location, or channel of either of those waterways, is prohibited by section 10 of the river and harbor act of March 3, 1899 (30 Stat. 1151), unless in advance recommended by the Chief of Engineers and authorized by the Secretary of War. 217.
2. Same.—Under the treaty proclaimed May 13, 1910 (36 Stat. 2448), between the United States and Great Britain relating to boundary waters between the United States and Canada, the authority of the President is not limited to the prevention of interference with navigation, but extends to the regulation or supervision of diversions for power purposes within a daily maximum in the aggregate of 20,000 cubic feet of water per second and to the prevention of any diversion whatever for such purposes in excess of that maximum. 217.

NIAGARA RIVER—Continued.

3. *Same.*—In the absence of legislation by Congress, the President may not only prohibit the importation of electrical power to this country from Canada but may also grant permission therefor subject to such conditions as to him may seem good. 217.

NONASSEMBLED EXAMINATIONS. *See* CIVIL SERVICE, 5.**NORWAY.**

ENTRY OF WOOD PULP FROM. *See* CUSTOMS LAWS, 2, 3.

OFFICERS. *See* ARMY, 1, 2, 3, 4; MARINE CORPS; NAVY, 2, 4, 5, 6; PUBLIC HEALTH SERVICE; REVENUE-CUTTER SERVICE; PARCEL POST.

OKANOGAN NATIONAL FOREST, WASH. *See* NATIONAL FORESTS, 1.

OPIUM.

1. Canal Zone—Importation and Use of Opium—Jurisdiction of Courts.—Sections 5 and 6 of the act of January 17, 1914, which is amendatory of the act of February 9, 1909 (35 Stat. 614), prohibiting the importation and use of opium for other than medical purposes, are applicable to the Canal Zone. 271.
2. *Same.*—The courts of the Canal Zone have jurisdiction, under the Panama Canal act of August 24, 1912 (37 Stat. 560), to impose the penalties prescribed in section 7 of the said act of January 17, 1914. 271.

PACIFIC GAS AND ELECTRIC CO.

VALIDITY OF CONTRACT. *See* CONTRACTS, 12, 13.

PANAMA. *See* CANAL ZONE; CONTRACTS, 2.

PANAMA CANAL.

1. Antitrust Laws.—Under the provisions of section 11 of the Panama Canal act of August 24, 1912 (37 Stat. 567), the question whether the person or corporation who owns, operates, or controls any vessel seeking passage through the canal is doing business in violation of the antitrust laws is to be determined by the final judgment or decree of a court of the United States of competent jurisdiction. 355.
2. *Same.*—Where a vessel seeking passage through the canal is owned or operated by persons against whom no judgment that they have violated the antitrust laws has been rendered by a court of competent jurisdiction, there is upon the officials of the canal no duty to refuse to permit the vessel to pass. 355.

PANAMA CANAL—Continued.

3. **Same.**—Where the vessel is operated or controlled by a person or company against whom a judgment has been rendered under the antitrust laws in a court of competent jurisdiction, if the proceeding was at the instance of the United States and resulted in a decree designed to restore competitive conditions, and no question has been raised by the United States in appropriate judicial proceedings as to noncompliance with such decree, it should not be refused passage through the canal. 355.
4. **Same.**—Should a case come to the attention of the canal authorities, where the judgment was a conviction under the criminal sections of the Sherman law or was a judgment in a suit brought by private parties, they might well require some affirmative showing by affidavit or otherwise that the violations had ceased. 355.
5. **Panama Railroad Rates.**—The executive officers of the Government have no authority under existing law to fix rates over the Panama Railroad below the cost of service for the purpose of reimbursing the losses of private shippers resulting from the closing of the Panama Canal. 508.
6. **Retirement of Army and Navy Officers Serving on the Isthmus of Panama.**—Under the act of March 4, 1915 (38 Stat. 1190), providing for recognizing the services of certain officers of the Army, Navy, and Public Health Service in connection with the construction of the Panama Canal, when an officer otherwise within the purview of the act applies for retirement he *must* be retired, and the President has no discretionary authority to postpone the date of retirement to such time as he may deem proper. 406.
7. **Same.—Salaries and Privileges Under Panama Canal Act.**—The money value of the privileges of quarters, light, and fuel should not be taken into consideration in determining the salary or compensation of employees of the Panama Canal, who are appointed and whose salary or compensation is fixed under the provisions of the Panama Canal act of August 24, 1912 (37 Stat. 561). 548.
8. **Same.**—The term "compensation," as used in section 4 of the Panama Canal act, refers to salary or wages payable to employees as separate and distinct from the privileges or allowances that may be granted them as to quarters, light, and fuel. 548.

See also EIGHT-HOUR LAW, 5, 6.

PANAMA RAILROAD. *See* PANAMA CANAL, 5.

PAPER.

FOR EXECUTIVE DEPARTMENTS. *See* PUBLIC PRINTER, 3, 4.

FOR POSTAL CARDS. *See* PUBLIC PRINTER, 4.

FOR PRINTING AND BINDING. *See* CONTRACTS, 3, 4, 5.

PARCEL POST.

The executive departments and the officers of the Government are entitled to the benefit of the parcel-post law, and penalty envelopes or labels may be used in sending by parcel-post fourth-class matter not exceeding 11 pounds in weight. 112.

PASSENGERS.

BAGGAGE. *See* VESSELS, 3.

TRANSPORTED BY FOREIGN SHIPS. *See* VESSELS, 2.

PATENTS, COMMISSIONER OF.

COPY FOR ANNUAL REPORT. *See* PUBLIC PRINTER, 2.

PATENTS TO LAND.

SUITS TO ANNUL. *See* PUBLIC LANDS, 1, 4.

PAY OFFICERS.

NAVY. *See* NAVY, 4.

PENALTY ENVELOPES. *See* FEDERAL RESERVE BOARD, 1.

PERMITS. *See* RIGHTS OF WAY, 3.

PHILIPPINE ISLANDS.

1. **Bilibid Prison at Manila.**—The Philippine Islands are a Territory within the meaning of section 5549 of the Revised Statutes, as amended, and as there is no suitable prison at Shanghai, China, for the confinement of convicts sentenced to imprisonment for long terms, the Bilibid Prison at Manila will therefore be designated as the place of confinement for United States prisoners who have been or may be in future convicted and sentenced by the United States court for China, at Shanghai, to terms of imprisonment exceeding three years. 462.
2. **Civil Service Employees, Quartermaster's Department.**—The Civil Service Commission has no authority to cancel the classification of an employee brought within the classified civil service under the Executive order of March 1, 1904, which classified certain positions in the civil service of the War Department in the Philippines. 79.
3. **Same.**—A person in the classified civil service can not be deprived of his status in the service except by removal as provided in section 6 of the act of August 24, 1912 (37 Stat. 555), and it is for the head of a department, and not the Civil Service Commission, to determine when there exists proper cause for removal. 79.

PHOENIX, ARIZ.

SUPPLY OF ELECTRICITY. *See* CONTRACTS, 13.

POLITICAL DISCRIMINATION.

RULES PROHIBITING. *See* CIVIL SERVICE, 10.

PORTO RICO.

1. **Importation of Coffee into Porto Rico.**—So much of the provisions of sections 2 and 3 of the act of April 12, 1900 (31 Stat. 77), as refers to the importation of coffee into Porto Rico was repealed by the tariff act of August 5, 1909 (36 Stat. 71), and is no longer in force, but the provisions of the tariff act of October 3, 1913 (38 Stat. 152), including coffee upon the free list, are applicable to its importation into Porto Rico. 275.
2. **Validity of Bond Issues.**—Assuming that the proceedings of the Executive Council of Porto Rico in connection with the proposed issue of \$300,000 refunding bonds and of \$400,000 irrigation bonds were regular and that these bonds have been authorized by the council, said bonds will, when duly sold, delivered, and paid for, constitute the valid obligation of the people of Porto Rico. 428.

PORTS OF UNITED STATES. *See* COLLECTORS OF PORTS; VESSELS, 7, 8, 11.

POST OFFICE APPROPRIATION ACT.

EXCEPTED POSITIONS. *See* CIVIL SERVICE, 2.

PUBLIC HIGHWAYS. *See* EIGHT-HOUR LAW, 8.

STAR-ROUTE SERVICE. *See* POSTAL SERVICE, 2.

POSTAL CARDS.

PAPER FOR PRINTING. *See* PUBLIC PRINTER, 4.

POSTAL RECEIPTS. *See* FEDERAL RESERVE BANKS, 5.

POSTAL SAVINGS SYSTEM.

1. **Emergency Credit.**—The practice of excluding the emergency credit from the regular quota of funds assigned to a postal savings depository is not in conflict with the provision of section 9 of the postal savings act of June 25, 1910 (36 Stat. 816), which requires that such funds shall be deposited substantially in proportion to the capital and surplus of each bank. 162.
2. **Public Funds.**—That portion of section 15 of the Federal reserve act of December 23, 1913 (38 Stat. 265), reading: "No public funds of the * * * postal savings * * * shall be deposited, in the continental United States, in any bank not belonging to the system established by this act," does not take effect until after a reserve bank has been

POSTAL SAVINGS SYSTEM—Continued.

authorized by the comptroller to "commence business" in the district and the Secretary "shall have officially announced" its establishment. 304.

3. Same.—Funds of the postal savings on deposit elsewhere at the time that the above clause becomes operative, need not be then transferred to, and redeposited in, a member or reserve bank. 304.

POSTAL SERVICE.

1. Employment of Temporary and Auxiliary Clerks and Letter Carriers.—The authority of the Postmaster General to employ temporary and auxiliary clerks and substitute, auxiliary, and temporary letter carriers is dependent entirely upon the appropriations made by Congress for that purpose, and hence he would not be justified in incurring a deficiency in respect to their employment. 157.
2. Star-Route Service.—As the Postmaster General is expressly authorized by law to enter into contracts for carrying the mail for a term not exceeding four years without regard to the appropriations therefor, and as the Post Office appropriation act of March 4, 1913 (37 Stat. 791), does not undertake to limit that authority, he may contract for star-route service for the current fiscal year in excess of the appropriation therefor contained in that particular act. 186.

RURAL DELIVERY. *See* EIGHT-HOUR LAW, 17.

POSTMASTER GENERAL.

AUTHORITY TO CONTRACT FOR PAPER, ETC. *See* PUBLIC PRINTER, 4.

AUTHORITY TO CONTRACT FOR STAR-ROUTE SERVICE. *See* POSTAL SERVICE, 2.

AUTHORITY TO EMPLOY TEMPORARY CLERKS, ETC. *See* POSTAL SERVICE, 1.

POSTMASTERS.

RECESS APPOINTMENT. *See* RECESS APPOINTMENT, 1, 2.

PREFERENTIAL ON CUBAN SUGAR. *See* CUSTOMS LAWS, 5.

PRESIDENT.

AUTHORITY OVER BOUNDARY WATERS BETWEEN UNITED STATES AND CANADA. *See* NIAGARA RIVER, 2.

AUTHORITY OVER IMPORTATION OF ELECTRICAL POWER TO UNITED STATES. *See* NIAGARA RIVER, 3.

AUTHORITY TO MAINTAIN CENSORSHIP AT RADIO STATIONS. *See* CENSORSHIP.

EXECUTIVE ORDER. CANAL ZONE. *See* CANAL ZONE, 1, 2, 3.

PRESIDENT—Continued.

PROCLAMATION. EXPORT OF ARMS, ETC. *See* ARMS AND MUNITIONS OF WAR, 1, 2, 3, 5, 6, 7.

PROCLAMATION. NEUTRALITY. *See* CENSORSHIP.

PROMOTION OF ARMY OFFICERS. *See* ARMY, 3.

PURCHASE OF RAILROADS. *See* ALASKA.

RECESS APPOINTMENT. *See* RECESS APPOINTMENT.

REVOCATION OF ORDER OF DISMISSAL OF MIDSHIPMAN. *See* NAVAL ACADEMY.

PRINTING AND BINDING.

PURCHASE OF ARTICLES FOR PRODUCTION. *See* EIGHT-HOUR LAW, 7.

PRINTING, JOINT COMMITTEE ON.

PRINTING AND BINDING SUPPLIES. *See* CONTRACTS, 3.

PRISONERS.

FEDERAL. *See* PHILIPPINE ISLANDS.

PROMOTIONS. *See* ARMY, 3; CIVIL SERVICE, 6, 7, 8, 9.

PROVISIONS. *See* ARMS AND MUNITIONS OF WAR, 5.

PUBLIC BUILDINGS.

CONSTRUCTION. *See* EIGHT-HOUR LAW, 8, 9, 10, 11, 12, 13, 14, 15, 16.

DRESSED MARBLE AND STONE FOR CONSTRUCTION. *See* EIGHT-HOUR LAW, 3.

PUBLIC HEALTH SERVICE.

RETIREMENT OF OFFICERS SERVING IN PANAMA. *See* PANAMA CANAL, 6.

PUBLIC HIGHWAYS. *See* EIGHT-HOUR LAW, 8.

PUBLIC FUNDS.

DEPOSITS. *See* FEDERAL RESERVE BANKS, 3, 4, 5.

PUBLIC LANDS.

1. Fort Sabine Military Reservation.—The limitation provisions of the acts of March 3, 1891, section 8 (26 Stat. 1099), and March 2, 1896, section 1 (29 Stat. 42), respecting suits to annul patents, relate to patents only; they do not apply to a conveyance effected by an approval and certification by the Land Department of a list of State selections. 572.
2. Same.—While section 2449 Revised Statutes does not govern the case of a grant which provides for vesting title through approval by the Secretary of the Interior, such as the Louisiana swamp land grant of March 3, 1849 (9 Stat. 352), *quære* whether under the practice of his department his approval is not to be taken as tentative merely and subject to revocation until the approval list has been certified under that section. 572.

PUBLIC LANDS—Continued.

3. **Same.**—The land belonging to the Fort Sabine Military Reservation was impliedly excepted from the grant of swamp lands made to the State of Louisiana by the act of 1849, *supra*; and an approval and certification of it, though occurring after the reservation was abandoned and had become subject to cash sale under the act of February 24, 1871 (16 Stat. 430), was void on its face and passed no title. 572.
4. **Same.**—The act of March 2, 1896, *supra*, extending the time for annulling land patents, including section 3 thereof, relating to the investigation of claims of bona fide purchasers, applies only to railroad and wagon grants, and has no application to swamp land or other grants. 572.
5. **Indemnity School Lands.**—In the certification of land to a State or Territory, the title to coal land embraced in the certified list, and known to be such at the time of the selection, remains in the United States, subject to the control and disposition of the Land Department. 485.
6. **Same.**—The jurisdiction of the Department of the Interior over excepted mineral land can be exercised after the lapse of the limitation period prescribed in the act of March 3, 1891 (2 Stat. 1099). 485.

ALASKA. *See* RIGHTS OF WAY, 5.

INDIAN LAND TITLES. *See* TENNESSEE, 1, 2.

PUBLIC MONEYS. *See* FEDERAL RESERVE BOARD, 2.**PUBLIC PRINTER.**

1. **Furnishing Copy of Annual Report.**—The annual report of the Commissioner of Education required by section 518 of the Revised Statutes is not within the operation of section 7 of the sundry civil appropriation act of August 1, 1914 (38 Stat. 680), which limits the time within which heads of executive departments or other branches of the public service shall furnish copies of their annual reports and accompanying documents to the Public Printer. 293.
2. **Same.**—The annual report of the Commissioner of Patents required by section 494 of the Revised Statutes is not within the operation of section 9 of the sundry civil appropriation act of August 1, 1914 (38 Stat. 680), relating to the time within which the annual reports and accompanying documents of the heads of executive departments and other branches of the public service shall be furnished to the Public Printer. 296.

PUBLIC PRINTER—Continued.

3. **Purchase of Paper and Postal Cards.**—All paper furnished by the Public Printer on requisitions for the ordinary use of the executive departments and chargeable to their appropriations must be purchased in accordance with the provisions of the act of January 12, 1895 (28 Stat. 601), regulating the purchase and standard of paper. 241.
4. **Same.**—The Postmaster General is authorized to contract for, purchase, and inspect paper for the printing of postal cards. 241.

QUARTERS.

REASSIGNMENT. *See* STATE, WAR, AND NAVY BUILDING.

RADIO COMMUNICATION. *See* WIRELESS TELEGRAPH.

RADIO STATIONS.

GOVERNMENT CENSORSHIP. *See* CENSORSHIP.

RAILROADS.

- ALASKA, COMPENSATION FOR ACCIDENTS. *See* WORKMEN'S COMPENSATION, 1, 2.
- CLAIMS OF UNITED STATES. *See* CENTRAL BRANCH UNION PACIFIC RAILROAD.
- PURCHASE IN ALASKA. *See* ALASKA.
- EMPTY CARS. *See* ARMS AND MUNITIONS OF WAR, 2.
- RATES. *See* PANAMA CANAL, 5.
- ROUTING OF FEDERAL TROOPS. *See* CONTRACTS, 9.
- PROSECUTION. *See* CONTRACTS, 11.

RECESS APPOINTMENT.

1. **President.**—A vacancy in a postmastership having occurred during the session of the Senate, and the Senate having failed to confirm an appointment, the President may then appoint a person to fill the vacancy by temporary commission to expire at the end of the next session of the Senate. 314.
2. **Same—Salary.**—The question as to whether the appointee can be paid the salary of the office before confirmation by the Senate should be referred to the Comptroller of the Treasury for determination, as this is a matter which would naturally come before him, and as to which the opinion of the Attorney General would only be advisory. 314.

RECIPROCITY. *See* CUSTOMS LAWS, 2.

RECLAMATION PROJECTS.

Transfer of Completed Reclamation Projects to Water Users.—The Secretary of the Interior is not authorized by the reclamation act of June 17, 1902 (32 Stat. 388), to turn over the operation and maintenance of completed reclamation proj-

RECLAMATION PROJECTS—Continued.

ects, in whole or in part, or to any extent, to water users' associations before the payment by such water users for water rights are made for the major portion of the lands irrigated by such works. 208.

RECLAMATION SERVICE.

RECEIPTS FROM SALES OF TIMBER. *See* NATIONAL FORESTS, 3.

RECORDER OF DEEDS, D. C. *See* DISTRICT OF COLUMBIA.

RELIQUIDATION OF ENTRIES. *See* CUSTOMS LAWS, 6.

RETIRED OFFICERS. *See* ARMY, 1, 2; NAVY, 2.

PUBLIC HEALTH SERVICE. *See* PANAMA, 6; REVENUE-CUTTER SERVICE.

REVENUE-CUTTER SERVICE.

Eligibility of Retired Officers to Civil Offices.—A retired officer of the Revenue-Cutter Service does not come within the purview of the Executive order of January 17, 1873, which prohibits a person while holding a Federal civil office from accepting or holding a State, Territorial, or municipal office. 75.

REVENUE LAWS.

STAMP TAX ON STOCK CERTIFICATES. *See* FEDERAL RESERVE BANKS, 7.

REVENUES OF GOVERNMENT. *See* FEDERAL RESERVE BANKS, 5.

RIDING SADDLES. *See* ARMS AND MUNITIONS OF WAR, 6.

RIFLES. *See* ARMS AND MUNITIONS OF WAR, 1.

RIGHTS OF WAY.

1. National Forests—Generation of Electricity.—Under section 4 of the act of February 1, 1905 (33 Stat. 628), a right of way may be granted through the national forests when the objective is to employ the right of way in a process of "milling and reduction of ores," and it is unobjectionable that the intermediate purpose is to generate and use electricity. 358.
2. Same—Transmission of Electrical Power.—Section 4 of the act of February 1, 1905 (33 Stat. 628), does not invest the Secretary of the Interior with authority to grant rights of way for transmission lines through the national forests for the distribution of electrical power. 263.
3. Same.—Applications for revocable permits under the act of February 15, 1901 (31 Stat. 790), should be filed with and passed upon by the Secretary of Agriculture when they relate to lands of the national forests. 263.

RIGHTS OF WAY—Continued.

4. Same.—The conclusions expressed in opinion of February 3, 1912 (29 Op. 303), construing a provision of the act of March 4, 1911 (36 Stat. 1253), relative to the authority of the Secretary of Agriculture to grant rights of way through national forests for electrical, telephone, and telegraph purposes, adhered to. 263.

5. Public Lands in Alaska.—Revocable licenses under the act of February 15, 1901 (31 Stat. 790), or easements under the act of March 4, 1911 (36 Stat. 1253), may be granted for the development and transmission of electric power upon public lands situate in Alaska. 387.

RAILROAD. *See* AQUEDUCT BRIDGE, VA., 2, 3.

RIO GRANDE BOUNDARY. *See* BOUNDARIES, 3, 4.

RIPARIAN RIGHTS. *See* RECLAMATION PROJECTS.

RIVERS AND HARBORS.

GOVERNMENT WORK IN CONSTRUCTION, ETC. *See* EIGHT-HOUR LAW, 5, 6.

ROAD IMPROVEMENTS. *See* EIGHT-HOUR LAW, 17.

SADDLES. *See* ARMS AND MUNITIONS OF WAR, 6.

SAILORS. *See* SOLDIERS AND SAILORS.

ST. ELIZABETHS HOSPITAL. *See* GOVERNMENT HOSPITAL FOR THE INSANE.

ST. MARYS RIVER.

MOVEMENT AND ANCHORAGE OF VESSELS. *See* VESSELS, 4.

SALARIES.

PANAMA CANAL ACT. *See* PANAMA CANAL, 7, 8.

RECESS APPOINTMENT. *See* RECESS APPOINTMENT, 2.

REDUCTION OF COMPENSATION. *See* SOLDIERS AND SAILORS.

SALT RIVER RECLAMATION PROJECT. *See* CONTRACTS, 12, 13.

SAN FRANCISCO.

LOSSES IN CONSTRUCTING CUSTOMHOUSE. *See* EARTHQUAKE LOSSES, 1, 2.

SCHOOL LAND INDEMNITY SELECTIONS. *See* PUBLIC LANDS, 5, 6.

SEAMEN'S ACT.

SECTION 6. *See* VESSEL, 5, 6.

SECTION 14. *See* VESSELS, 7, 8, 9, 10.

SHIPPING ACT.

SECTION 2 AS AMENDED. *See* VESSELS, 5, 6.

SOLDIERS AND SAILORS.

Reduction of Compensation of Honorably Discharged Soldiers and Sailors.—The proviso of section 4 of the act of August 23, 1912 (37 Stat. 413), relating to the reduction in rank and salary of honorably discharged soldiers and sailors, does not prohibit the head of a department from conforming the salary of such employees to the grade or character of work they may be called upon to perform. 167.

STAMP TAX.

STOCK CERTIFICATES. *See* **FEDERAL RESERVE BANKS**, 7.

STANDARDS BUREAU.

Promotion of Apprentices.—The provision of the act of July 16, 1914 (38 Stat. 502), authorizing the promotion of apprentices in the Bureau of Standards, includes "laboratory," "shop," and "office" apprentices. 430.

STAR ROUTE SERVICE. *See* **POSTAL SERVICE**, 2.

STATE, SECRETARY OF.

AUTHORITY TO INVESTIGATE NONNAVIGABLE STREAMS. *See* **BOUNDARIES**, 3, 4.

STATE, WAR, AND NAVY BUILDING.

Reassignment of Quarters.—The consent of Congress is essential to a reassignment of the quarters now occupied by the departments in the State, War, and Navy Building. 70.

STIRRUPS. *See* **ARMS AND MUNITIONS OF WAR**, 6.

STOCK.

HELD BY NONRESIDENT FOREIGNERS. *See* **INCOME TAX**, 1, 2, 3, 4.

STAMP TAX ON CERTIFICATES. *See* **FEDERAL RESERVE BANKS**, 7.

STONE.

FOR PUBLIC BUILDINGS. *See* **EIGHT-HOUR LAW**, 3.

SUBSIDY BONDS. *See* **CENTRAL BRANCH UNION PACIFIC RAILROAD Co.**

SUGAR.

CUBAN, IMPORTED INTO UNITED STATES. *See* **CUSTOMS LAWS**, 5.

SUPERINTENDENTS.

OF ALIEN LABORERS. *See* **EIGHT-HOUR LAW**, 6.

SUPPLIES. *See* **CONTRACTS**, 15.

SWAMP LAND GRANTS. *See* **PUBLIC LANDS**, 2, 3, 4.

TARIFF. *See* **CUSTOMS LAWS.**

"TAURUS" (STEAMER). *See* **VESSELS**, 10.

TAX CASES.

COMPROMISE BEFORE DISTRAINT. *See* **INTERNAL REVENUE**, 1.

TEA BOARD.

Rehearing.—The Secretary of the Treasury has no authority under the tea-importation act of March 2, 1897 (29 Stat. 604), to direct a rehearing by the "tea board" after a final rejection by the board of tea entered for importation. 134.

TENNESSEE.

1. Land Titles.—The title of the Cherokee Indians to the lands ceded by them to the United States by the treaty of New Echota (7 Stat. 478) was a right of occupancy only, the underlying fee being in the State of Tennessee. 284.
2. Same.—The treaty freed the lands of the burden of the Indian title, leaving the unencumbered fee in the State. 284.

TENURE OF OFFICE. *See* COLLECTORS OF PORTS; INTERNAL REVENUE, 2, 3.

TETON NATIONAL FOREST. *See* NATIONAL FORESTS, 2.

TIMBER.

FOR JACKSON LAKE DAM. *See* NATIONAL FORESTS, 2.

TITLES TO LAND. *See* PUBLIC LANDS, 1, 2, 3, 4, 5, 6.

TOLERANCES. *See* FOOD AND DRUGS ACT.

TRANSPORTATION.

OF MERCHANDISE FROM SEATTLE TO FAIRBANKS. *See* VESSELS, 11.

OF PASSENGERS BY FOREIGN VESSELS. *See* VESSELS, 2.

TREASURY, COMPTROLLER OF.

DECISIONS. *See* NAVY, 4, 5.

PAYMENT OF SALARY BEFORE SENATE CONFIRMATION. *See* RECESS APPOINTMENT, 2.

TREASURY DEPARTMENT.

PUBLIC MONEYS SUBJECT TO AUDIT. *See* FEDERAL RESERVE BOARD, 2.

TREASURY, SECRETARY OF.

AUTHORITY TO COMPROMISE TAX CASE. *See* INTERNAL REVENUE, 1.

AUTHORITY TO DIRECT REHEARING OF TEA BOARD. *See* TEA BOARD.

AUTHORITY FOR DIRECT RELIQUIDATION OF ENTRIES. *See* CUSTOMS LAWS, 6.

AUTHORITY TO REIMBURSE CONTRACTOR. *See* EARTHQUAKE LOSSES, 1, 2.

AUTHORITY TO WAIVE PERFORMANCE OF CONTRACT. *See* CONTRACTS, 15.

POWERS PRESERVED TO. *See* FEDERAL RESERVE BOARD, 3.

TREATIES.

CANADIAN BOUNDARY WATERS. *See* BOUNDARIES, 1, 2; NIAGARA RIVER, 2.

FAVORED NATION CLAUSE. *See* CUSTOMS LAWS, 5.

UNITED STATES AND NEW GRENADA. *See* COLOMBIA, 1.

TROOPS.

MILITARY MOVEMENT. *See* CONTRACTS, 7, 8, 9, 10, 11.

TRUSTS AND MONOPOLIES. *See* ANTITRUST LAWS.

TUTUILA. *See* CUSTOMS LAWS, 1.

UNITED STATES.

ACCEPTANCE OF GIFTS. *See* GROVER CLEVELAND BIRTHPLACE.

CLAIMS. *See* CENTRAL BRANCH UNION PACIFIC RAILROAD.

PRISONERS. *See* PHILIPPINE ISLANDS.

VARIATIONS. *See* FOOD AND DRUGS ACT.

VESSELS.

1. Foreign vessels.—Canadian boundary waters.—Section 3109 of the Revised Statutes, in imposing certain restrictions upon masters of foreign vessels which are not imposed upon masters of domestic vessels, is in conflict with the provisions of article 1 of the convention concerning the boundary waters between the United States and Canada, concluded January 11, 1909, between the United States and Great Britain; the former provision must be regarded as superseded by the latter in so far as it is inconsistent therewith, and hence it is the duty of the administrative officers of the Government to fulfill the requirements of the treaty. 351.
2. Foreign Vessels Carrying Passengers from San Juan to New York.—The transportation of passengers by foreign vessels from San Juan, Porto Rico, to the port of New York, notwithstanding the fact that the passengers go ashore for brief stays at intervening foreign ports, is a violation of section 8 of the act of June 19, 1886 (24 Stat. 81), as amended by section 2 of the act of February 17, 1898 (30 Stat. 248). 44.
3. Passengers' Baggage—Lading and Unlading of Vessels at Night.—The word "cargo" as used in section 5 of the act of February 13, 1911 (36 Stat. 901), relating to the lading and unlading of vessels at night, does not include passengers' baggage. 123.
4. St. Marys River.—The authority granted to the Secretary of War by section 7 of the act of March 4, 1915 (38 Stat. 1053), to define and establish anchorage areas in waters generally, does not divest the Secretary of Commerce of the specific authority granted him by the act of April 28, 1906 (34 Stat.

VESSELS—Continued.

- 136), to regulate the movement and anchorage of vessels in the St. Marys River. 459.
5. **Seamen's Act—Crew Space on Vessels.**—The words "this act" in section 6 of the seamen's act of March 4, 1915 (38 Stat. 1164), which amends section 2 of the shipping act of March 3, 1897 (29 Stat. 687), refer to the said act of 1897. 558.
 6. **Same.**—The requirements as to crew space on vessels, prescribed by section 6 of the act of March 4, 1915, apply to all vessels constructed after the passage of the act of March 3, 1897. 558.
 7. **Subject to Section 14 of Seamen's Bill.**—When not actually carrying passengers, neither foreign cargo nor foreign passenger steam vessels leaving ports of the United States are subject to the regulations prescribed by section 14 of the so-called "Seamen's bill" of March 4, 1915 (38 Stat. 1170). 441.
 8. **Same.**—Only foreign private steam vessels carrying passengers from any port of the United States to any other place or country which are not exempt by reason of the conditions set forth in section 4400 of the Revised Statutes, as amended, are subject to said regulations. 441.
 9. **Same.—Date Effective.**—Section 14 of the act of March 4, 1915, known as the seamen's bill, becomes effective on November 4, 1915, as to United States vessels and on March 4, 1916, as to all other vessels. 334.
 10. **Same.**—The steam vessel "Taurus," used in transporting persons for hire from New York City to and from the fishing banks in the Atlantic Ocean from 8 to 10 miles outside the lower bay of New York Harbor, is subject to certain provisions of section 14 of the seamen's act of March 4, 1915 (38 Stat. 1170), relating to life-saving appliances and equipment. 537.
 11. **Transportation of Merchandise from Seattle to Fairbanks.**—The transportation of merchandise on through bills of lading by American vessels from Seattle to Skagway, thence by rail over the White Pass and Yukon route across the international boundary to Whitehorse, in Yukon Territory, and thence by foreign vessels down the rivers, across the international boundary again, to Fairbanks, would not violate the provisions of section 1 of the act of February 17, 1898 (30 Stat. 248). 3.

ANTITRUST LAWS. *See* PANAMA CANAL, 1, 2, 3, 4.

APPARATUS FOR RADIO COMMUNICATION. *See* WIRELESS TELEGRAPH.

NEUTRALITY. *See* ATTORNEY GENERAL, 8.

WAIVER OF PERFORMANCE. *See* CONTRACTS, 15.

WAR DEPARTMENT.

1. Surrender of Personal Effects Formerly Belonging to Jefferson Davis.—Where property of a disloyal person was seized by the military forces of the Government during the Civil War, and no proceedings by way of forfeiture, condemnation, sale, etc., were had concerning it as would suffice to divest his title or any portion of it, and transfer it to third persons or to the United States, then a subsequent pardon restores to him his plenary title. 246.
2. Same.—The Secretary of War has authority to surrender certain personal effects in his official possession formerly belonging to Jefferson Davis to the latter's personal representatives. 246.

WAR, SECRETARY OF.

AUTHORITY TO ESTABLISH ANCHORAGE AREAS. *See* VESSELS, 4.

AUTHORITY TO LEASE WATER POWER. *See* BLACK WARRIOR RIVER, ALA.

AUTHORITY TO GRANT LEAVE TO OFFICERS TO ACCEPT CIVIL OFFICE. *See* ENGINEER CORPS.

AUTHORITY TO SURRENDER JEFFERSON DAVIS'S PERSONAL PROPERTY. *See* WAR DEPARTMENT, 1, 2.

CONTRACTS FOR LINCOLN MEMORIAL. *See* LINCOLN MEMORIAL, 1.

POWER TO ISSUE REVOCABLE LICENSES. *See* AQUEDUCT BRIDGE, VA., 2, 3.

WASHINGTON, ARLINGTON & FALLS CHURCH RAILROAD CO.

LICENSE FOR TRACKS, ETC. *See* AQUEDUCT BRIDGE, VA., 3.

WATER.

DIVERSION FROM NIAGARA RIVER. *See* NIAGARA RIVER.

WATER POWER.

LEASE OF. *See* BLACK WARRIOR RIVER, ALA.

PERMITS FOR FOREIGN CORPORATIONS. *See* NATIONAL FORESTS, 1.

WATER USERS.

TRANSFER OF RECLAMATION PROJECTS. *See* RECLAMATION PROJECTS.

WATERWAYS.

NAVIGABILITY. *See* BOUNDARIES, 4.

WIRELESS STATIONS. *See* CENSORSHIP.**WIRELESS TELEGRAPH.**

Apparatus for Radio Communication on Steam Vessels.—Article XI of the Service Regulations annexed to the international radiotelegraphic convention, which was ratified by the United States Senate on January 22, 1913, does not effect a modification of the terms of section 1 of the

WIRELESS TELEGRAPH—Continued.

amendatory act of July 23, 1912 (37 Stat. 199), relating to the requirement of apparatus for radio communication on steam vessels. 34.

WOOD.

FOR JACKSON LAKE DAM. *See* NATIONAL FORESTS, 2.

WOOD PULP.

ENTRY FROM NORWAY. *See* CUSTOMS LAWS, 2, 3.

WORDS AND PHRASES.

1. "Arms or munitions of war."—Whether certain air rifles are "arms or munitions of war" within the meaning of the joint resolution of Congress passed March 14, 1912, and the President's proclamation of the same date in pursuance thereof, is purely a question of fact which the Attorney General does not feel qualified to decide. 9.
2. "Cargo."—The word "cargo" as used in section 5 of the act of February 13, 1911 (36 Stat. 901), relating to the lading and unlading of vessels at night, does not include passengers' baggage. 123.
3. "Compensation."—The term "compensation" as used in section 4 of the Panama Canal act refers to salary or wages payable to employees as separate and distinct from the privileges or allowances that may be granted them as to quarters, light, and fuel. 548.
4. "Imported directly."—Wood pulp shipped to United States from Norway on through bills of lading en route at Rotterdam, when such transshipment is merely for transportation purposes does not prevent the goods from being "imported directly" from Norway "into the United States" within the meaning of section 2 of the so-called Canadian reciprocity act of July 26, 1911 (37 Stat. 11). 224.
5. "Place."—The word "place," as used in section 5138 of the Revised Statutes relating to the capitalization of national banks, means a corporate or quasicorporate body organized for the purpose of local government in a defined territory. 173.
6. "Political subdivisions."—Special assessment districts, when lawfully created under the authority of the States for the purpose of the improvement of streets and public highways, the provision of sewerage, gas and light, and the reclamation, drainage, or irrigation of considerable bodies of land within the States, are "political subdivisions" thereof within the meaning of the proviso to paragraph B, section 2, of the income-tax provision in the revenue act of October 3, 1913. 252.

WORDS AND PHRASES—Continued.

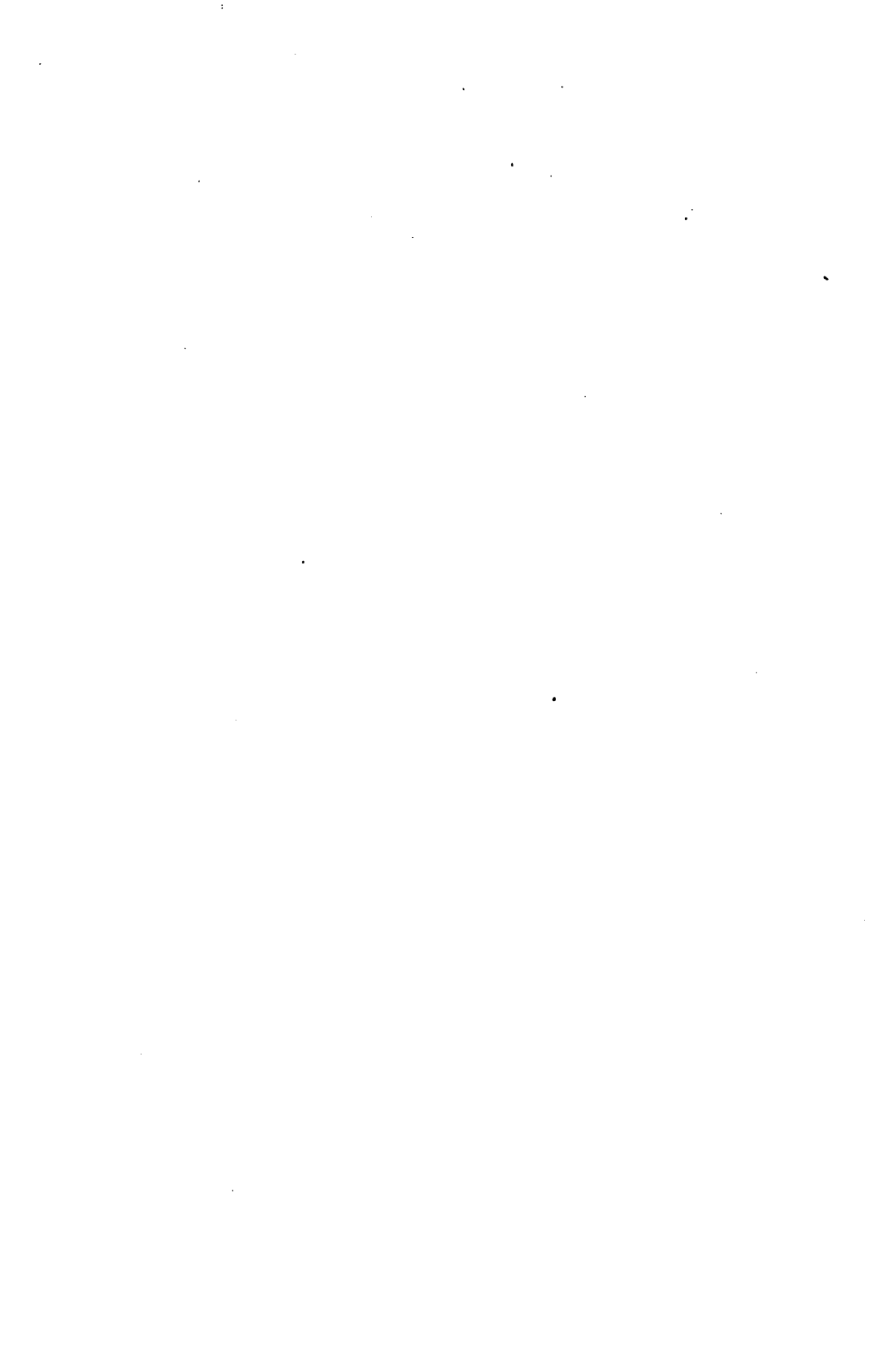
7. "**Public moneys.**"—Moneys received by the Federal Reserve Board, under section 10 of the Federal reserve act of December 23, 1913 (38 Stat. 261), are "public moneys" within the meaning of the auditing statutes, and consequently are subject to audit by one of the auditors of the Treasury Department. 308.
8. "**Revenues of the Government.**"—All postal receipts, including *fees only* from the money-order business, are "revenues of the Government" within the meaning of section 15 of the Federal reserve act of December 23, 1913 (38 Stat. 265), and may be deposited in Federal reserve banks or in their member banks. 553.
9. "**Sold or distributed to paid subscribers.**"—Opinion of September 25, 1912 (29 Op. 526), in so far as it gives a restricted meaning to the words "sold or distributed to paid subscribers," modified. 244.
10. "**Voluntary service.**"—The words "voluntary service," as employed in the above-mentioned act, were not intended to cover services rendered in an official capacity under regular appointment to an office otherwise permitted by law to be nonsalaried. 51.

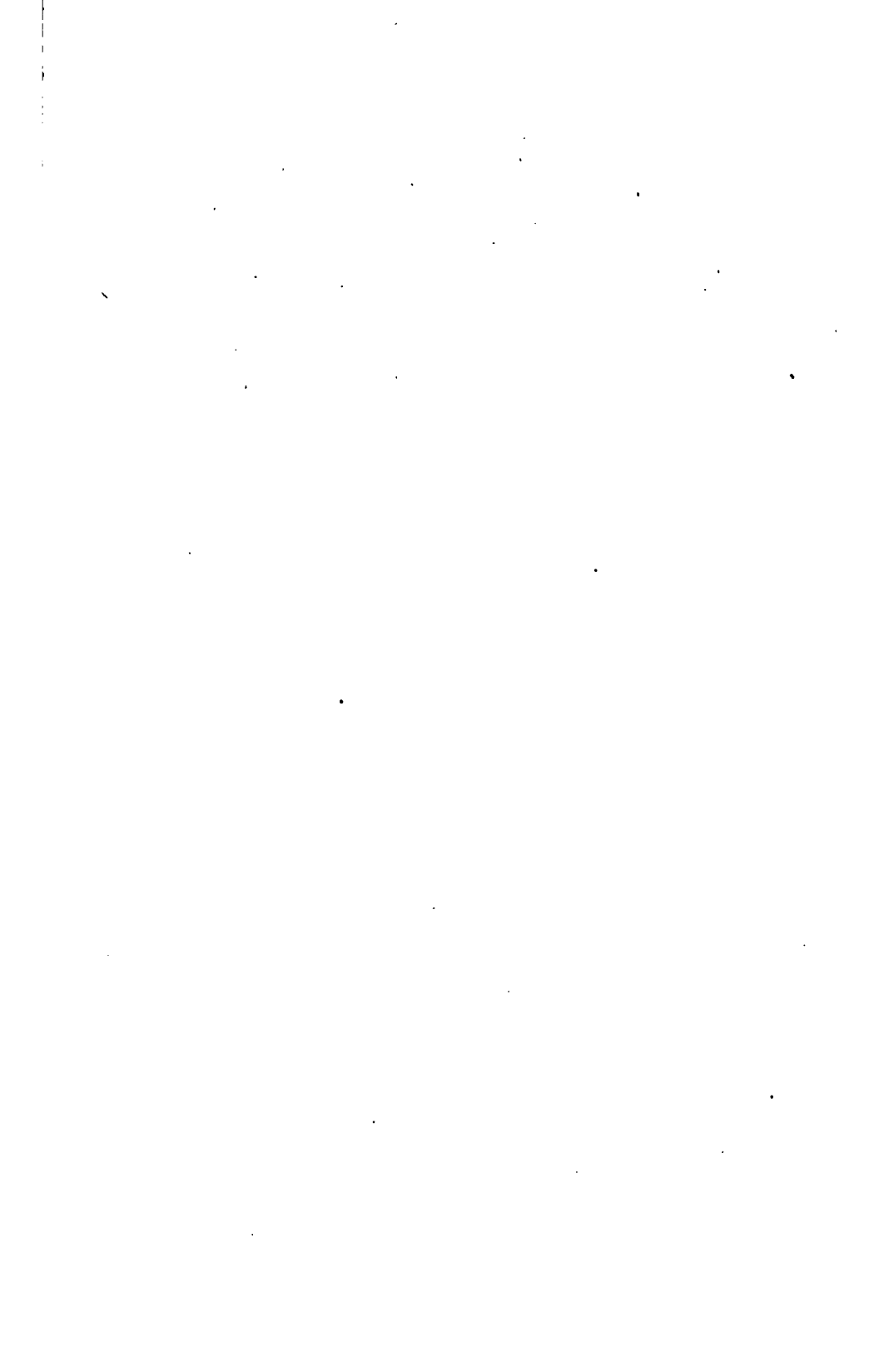
WORKMEN'S COMPENSATION.

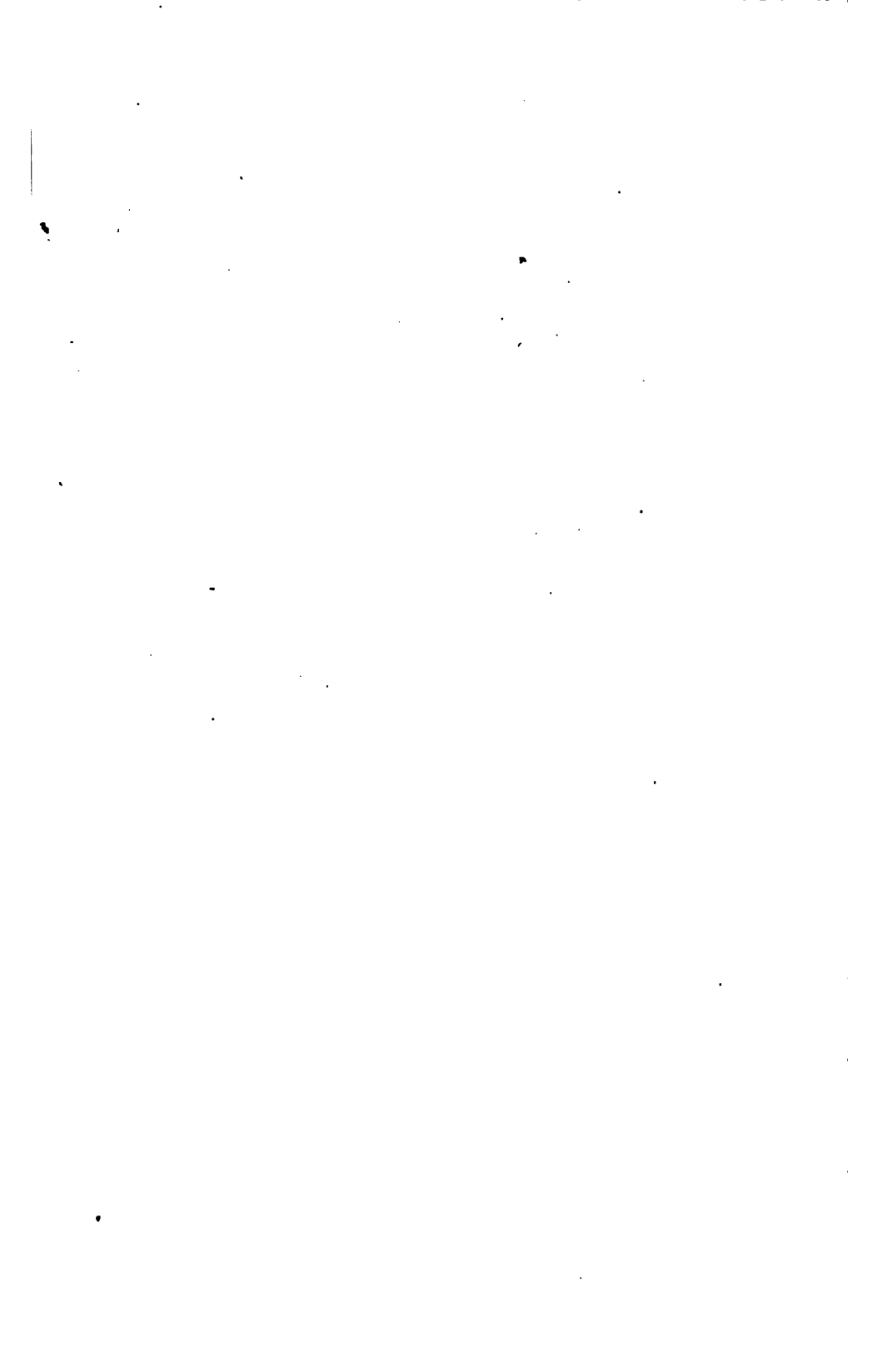
1. **Alaskan Railroad—Compensation for Accidents.**—It was within the power conferred upon the President by the act of March 12, 1914 (38 Stat. 305), authorizing the construction of railroads in Alaska, to issue the Executive order of April 10, 1915, directing the Secretary of the Interior to prepare and adopt a system of compensation for accidents to persons engaged in the work of construction of the proposed railroad in Alaska. 402.
2. **Same.**—The Secretary of the Interior having prepared such system in conformity to the Executive order of April 10, 1915, it is within his authority to put it into effect. 402.
3. **Authority to Determine Claims.**—Final authority to determine claims arising under the workmen's compensation act of May 30, 1908 (35 Stat. 556), as amended, rests in the Secretary of Labor. 145.

"WORKS OF ART." See COPYRIGHT LAW, 2.











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